Supreme Court U.S.
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No. 06-806

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

BILLY D. WILLIAMS, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress directs any claim for black lung benefits shall be filed within three years of a medical determination of total disability due to pneumoconiosis. Billy Williams, a retired coal miner, received a medical determination of total disability due to pneumoconiosis in 1995. Is the Court of Appeals' finding it is "inherently unfair" to bar a 2001 claim for black lung benefits filed six years after a medical determination of total disability due to pneumoconiosis contrary to the time limits imposed by Congress?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Billy D. Williams ("Williams") is a claimant seeking lifetime disability benefits under the Black Lung Benefits Act ("BLBA"). 30 U.S.C. § 901 *et seq.* He was the Respondent in the court of appeals and is a Respondent in this Court.

Consolidation Coal Company ("Consol") is the responsible coal miner operator that last employed Williams. Consol was the Petitioner in the court of appeals and is the Petitioner in this Court.

The Director, Office of Workers' Compensation Programs, is an employee of the United States Department of Labor ("DOL") assigned general responsibility by the Secretary of Labor for the administration of the Federal Black Lung Benefits Program. The Director, by delegation, is a statutory party in interest in black lung claims. 30 U.S.C. § 932(k). The Director was a Respondent in the court of appeals and is a Respondent in this Court.

Consol is a wholly owned subsidiary of Consol Energy, Inc., a Delaware Corporation.

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Consolidation Coal Company ("Consol") respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled proceeding on 8 September 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Consolidation Coal Co. v. Williams is reported at 453 F.3d 609 (4th Cir. 2006) and reprinted in the Appendix to this Petition ("App.") at 3a. The court of appeals denied a petition for rehearing *en banc* which is reprinted in the Appendix at 1a. The 8 August 2005 decision of the Benefits Review Board, the administrative decision reviewed by the court of appeals, has not been reported and is reprinted in the Appendix at 30a. The 1 June 2004 decision of Administrative Law Judge Fletcher E. Campbell, Jr. has not been reported and is reprinted in the Appendix at 57a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on 13 July 2006. App. 3a. The court of appeals denied a timely filed petition for rehearing on 8 September 2006. App. 1a. Jurisdiction was conferred on the court of appeals by the filing of a timely petition for review of the decision and order of the Benefits Review Board, in accordance with 33 U.S.C. § 921(c) of the Longshore and Harbor Workers' Compensation Act incorporated by reference into 30 U.S.C. § 932(a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition has been filed within the time period provided by Supreme Court Rule 13.3, within ninety days of the entry of denial of a timely filed petition for rehearing.

STATUTES AND REGULATORY PROVISIONS INVOLVED

1. Section 442 of the Black Lung Benefits Act, 30 U.S.C. § 932, provides in part.

> (f) Limitation on filing of claims
>
> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later--
>
> **(1)** a medical determination of total disability due to pneumoconiosis; or
> **(2)** March 1, 1978.

2. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, include the following:

> **20 C.F.R. § 725.308 Time limits for filing claims.**
>
> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of

enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part on or before December 31, 1980. Any claim filed after that date shall be untimely unless the time for filing has been enlarged for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the validity of a three year statute of limitations contained in the applicable provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, were commonly referred to as Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 932(f), and implemented by 20 C.F.R. §725.308. The time limits for filing any claim are mandatory and, absent extraordinary circumstances, may not be waived or tolled. 20 C.F.R. § 725.308(c). The Fourth Circuit succinctly states the crux of issue presented explaining:

> Consolidation first contends that Williams's black lung claim, which was filed more than three years after he received Dr. Lebovitz's diagnosis of totally disabling coal workers' pneumoconiosis, was untimely. Section 932 of Title 30 provides that any claim for benefits "shall be filed within three years after whichever of the following occurs later (2) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. § 932(f). The implementing regulation, 20 C. F.R. § 725.308, further explains that the three-year statute of limitations is triggered when the miner received a medical determination of total disability arising from pneumoconiosis:
>
> > A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within

> three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.

20 C.F.R. § 725.308(a).

> The facts of this appeal present an unusual situation in which Williams received Dr. Lebovitz's diagnosis in 1995, but failed to submit that diagnosis prior to DOL's ultimate denial of his first claim for black lung benefits in 1996. Thereafter, Williams filed his second claim for benefits in 2001 - six years after he learned of Dr. Lebovitz's diagnosis. Thus, we must determine, as a threshold matter, whether Williams's receipt of Dr. Lebovitz's report triggered the three-year statute of limitations for his second claim.

App. at 11a-12a. The panel errs by ruling Dr. Lebovitz's 1995 medical opinion is inconsequential to the 2001 claim. The panel errs believing Dr. Lebovitz's opinion is insufficient to trigger the three year statute of limitation, ignoring the unambiguous statute mandating any claim for benefits shall be filed within three years of a medical determination of total disability due to pneumoconiosis.

II. An Intercircuit and Intracircuit Split Exist.

The timeliness provision of the Black Lung Benefits Act has been addressed in published decisions by the United States Courts of Appeals for the Fourth, Sixth, and Tenth Circuits.[1] The Sixth Circuit applied the timeliness statute as written holding that medically support d claims, even if ultimately deemed "premature" because of the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602, 608 (6th Cir. 2001). Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims. *Id.* In Wyoming Fuel, the Tenth Circuit held a final finding by a DOL claims adjudicator that a claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of statute of limitations. Wyoming Fuel Co. v. Director, OWCP, 90 F.3d 1502, 1507 (10th Cir. 1996).[2] The Tenth Circuit rejected the

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[1] Consolidation Coal Co. v. Williams, 453 F.3d 609 (4th Cir. 2006); Island Creek Coal Co. v. Henline, 456 F.3d 421 (4th Cir. 2006); Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602 (6th Cir. 2001); Wyoming Fuel Co. v Director, OWCP, 90 F.3d 1502 (10th Cir. 1996).

[2] The miner in Wyoming Fuel, Nick J. Brandolino, returned to coal mine employment for another two years after the OWCP denied his 1982 claim, resetting the timeliness clock for his 1985 claim because of additional exposure to coal mine dust. *Id.* at 1505. Consequently, the Tenth Circuit did not need to consider the timeliness of his second claim.

notion that duplicate black lung claims are immune from time limits explaining:

> When a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination.

Wyoming Fuel, 90 F.3d at 1507.

In a subsequent decision, another panel of the Fourth Circuit reached a conclusion irreconcilable with Williams, holding that adding other limitations to the timeliness provisions, such as, requiring a "written medical opinion," are devoid of merit. *See* Island Creek Coal Co. v. Henline, 456 F.3d 421, 425-26 (4th Cir. 2006). The Henline panel rejects the requirement added by the Benefits Review Board of written notice to a miner that he is totally disabled from pneumoconiosis to trigger the start of the three-year statute of limitations clock on the miner's claim for black lung benefits as contrary to the plain language of 30 U.S.C. 932(f) and its implementing regulation, 20 C.F.R. 725.308(a). Henline, 456 F.3d at 425-26.

III. Reasons for Granting the Writ

The language of the time limitations for filing claims under 30 U.S.C. § 932 (f), or the implementing regulation, 20 C.F.R § 725.308, are neither vague nor unclear. Congress unambiguously directs that any claim for benefits shall be filed within three years of a medical determination of total disability due to coal workers' pneumoconiosis. 30 U.S.C. § 932(f). Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to

fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979). Despite clear Congressional mandate, a 1995 medical opinion of total disability due to coal workers' pneumoconiosis communicated to a miner and his attorney,[3] is deemed inadequate to bar a 2001 application as untimely under the BLBA.

A clear instruction from Congress provides no license for courts to rewrite the language enacted by the legislature. *See* Heckler v. Mathews, 465 U.S. 728, 742 (1984). Nonetheless, in Williams the Fourth Circuit rewrites the statute to hold "that a medical determination later deemed to be a misdiagnosis of pneumoconiosis by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims." App. 18a. A statute is unambiguous when it is plain to anyone reading the statute that it encompasses the conduct at issue. *See e.g.* Salinas v.

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[3] There is no issue Mr. Williams was advised by his attorney that the report from Dr. Lebovitz was sufficient to establish entitlement to black lung benefits. The written medical opinion states "this man is permanently and totally disabled secondary to the entity of coal workers' pneumoconiosis." Despite this, Mr. Williams opted to hold the report and take no action when DOL issued the denial of benefits about two months after Dr. Lebovitz' report was written and was provided to Mr. Williams. Indeed, Mr. Williams choose to ignore the instructions DOL provided on what action to take if he disagreed with the denial of the claim: these instructions included the suggestion for submission of additional medical evidence, evidence such as the very report he had from Dr. Lebovitz. The diagnosis was based, in part, on a positive chest x-ray interpreted as positive for pneumoconiosis and Mr. Williams' complaints of shortness of breath. App. 65a.

United States, 522 U.S. 52, 60 (1997)(*citing* Gregory v. Ashcraft, 501 U.S. 452, 467 (1991)). This Court has explained:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e.g.*, United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242 (1989); United States v. Goldenberg, 168 U.S. 95, 102-103 (1987); Oneale v. Thornton, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." Rubin v. United States, 449 U.S. 424, 430 (1981); *see also* Ron Pair Enterprises, *supra*, 489 U.S. at 241.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Williams panel's rewriting of the plain statute is at odds with established precedent.

In other situations, the Fourth Circuit has correctly considered statutes and applied this Court's precedent. *See, e.g.*, Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir.1981)(*citing* State Water Control Bd. v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977)(The plain meaning of a statute should be rejected only if there is substantial, unambiguous evidence supporting a contrary interpretation). When the language at issue has a plain and unambiguous meaning, the plain meaning controls and dictates the outcome. Dept. of HUD v. Rucker, 535 U.S. 125 (2002)(language of housing statute unambiguously requires that public housing loan terms give local public housing authorities discretion to terminate lease of tenant based on

drug activity regardless of tenant's lack of knowledge of that activity); Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002)(statutory language as to assignment of retired coal miner to particular company was clear and unambiguous in precluding agency assignment); Brown v. Gardner, 513 U.S. 115 (1994)(regulation requiring a showing of fault was plainly contrary to statute having no element of fault). The language at issue concerning the time limitations for filing claims under the BLBA is plain and unambiguous, meaning the content dictates the outcome. Here, Mr. Williams' 2001 claim is not timely as it is filed more than three years after the 1995 medical determination of total disability due to pneumoconiosis.

There exists intracircuit split as Williams cannot be reconciled with the published decision from the Fourth Circuit in Henline. The Henline panel rejects the Board's requirement of written notice to a miner that he is totally disabled from pneumoconiosis to trigger the start of the three-year statute of limitations clock on the miner's claim for black lung benefits as contrary to the plain language of 30 U.S.C. 932(f) and its implementing regulation, 20 C.F.R. 725.308(a). Henline, 456 F.3d at 425. Inconsistent with the Henline, Williams adds to the plain language of 30 U.S.C. 932(f) the new rule "*that a medical determination later deemed to be a misdiagnosis of pneumoconiosis by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims.*" App. 18a. (*emphasis added*). Rather than rely on the language of the statute or the reasoning in the ALJ's determination,[4] the panel looked to its *en banc* decision in Lisa Lee Mine v. Director, OWCP, 86 F.3d 1358 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997), to justify

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[4] *See* App. 12a.

allowing this claim, filed six years after the diagnosis of total disability due to pneumoconiosis, to be deemed timely filed.

In Lisa Lee Mines, a divided *en banc* Fourth Circuit discussed the appropriate standard to apply to a miner's subsequent or duplicate claim for black lung benefits in light of a prior denial of benefits. While admitting that although Lisa Lee Mines primarily addressed the tests applicable to subsequent claims, the principles of finality expressed within that decision are found to bear on this appeal. App. 13a. Principles of finality the Fourth Circuit decided to extend to prior legal decisions in Lisa Lee Mines, concerning the consideration of medical opinions by DOL claims examiners, are not germain to the applicability of the time limits for filing claims.

DOL's 1996 denial of a prior claim is immaterial to whether Mr. Williams knew of a medical determination of total disability due to pneumoconiosis. The 1996 DOL determination did not consider Dr. Lebovitz's 1995 medical opinion. Rather than apply the clear language of the statute, the Williams decision strains to apply the holding in Lisa Lee Mines to this case, contorting the holding to find that it:

> must accept the DOL's denial of Williams's first claim in 1996 as final and correct, regardless of whether the DOL reviewed Dr. Lebovitz's diagnosis in adjudicating the claim. For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's [sic] pneumoconiosis as of January 11, 1996, necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we must treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams' first

> claim, we must summarily conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim.

App. 14a. Such an interpretation seeks to rewrite the otherwise clear and unambiguous meaning of 30 U.S.C. § 932(f) and to ignore the implementing regulation's prohibition on waiving or tolling the three year limitation. *See* 20 C.F.R. § 725.308(c). To circumvent the unambiguous language of the statute, the panel holds that the diagnosis by Dr. Lebovitz, never considered by DOL, is rendered a misdiagnosis in light of DOL's action denying the initial claim.

Even if medical opinions which OWCP considers in a prior adjudication as being insufficient to establish total disability due to pneumoconiosis could be deemed a misdiagnosis for legal purposes in a subsequent claim, neither reason, policy, nor justification exists to extend such a novel legal theory to circumvent the time limits on filing claims. The attempt to extend Lisa Lee Mines to trump the language of the time limits statute is nothing more than an attempt to approve the award of benefits in a claim which is not timely filed and cannot pass muster when considered under the plain and unambiguous language of the statute. Mr. Williams must be charged with knowing the medical determination of total disability due to pneumoconiosis and his claim cannot be held to accrue because of his "blameless ignorance." *cf.* Urie v. Thompson, 337 U.S. 163 (1949).[5]

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[5] In Urie v. Thompson, 337 U.S. 163 (1949), the Court held that a claim under the Federal Employers' Liability Act did not accrue until the plaintiff's injury manifested itself. In that case, plaintiff Urie contracted silicosis from his work as a fireman on a

To try to justify the result to hold the 2001 claim timely filed, the panel explains that no reason exists why a miner who has been denied benefits because he presented legally insufficient medical evidence must be forever barred from bringing a new claim even if he later develops pneumoconiosis. *See* App. 16a. Such reasoning serves no purpose other than to evade the legislative directive that all claims "shall" be filed within three years of a medical determination of total disability due to pneumoconiosis. Believing it would be "inherently unfair" to invoke to apply the statute of limitations based on the 1995 diagnosis by Dr. Lebovitz or it would be "illogical and inequitable" to hold such a diagnosis cannot sustain a subsequent claim only attempts the panel's quest to ignore the statute's clear language. *See* App. 18a. The panel's decision excuses Mr. Williams' purposeful choice to withhold Dr. Lebovitz's report and impose no consequences on him for withholding that information despite his being informed he was totally disabled as a result of pneumoconiosis by a physician. In so doing, the court ignores Congress specified three years after a medical determination of total disability due to pneumoconiosis was a reasonable time.

Finally, the panel relies on a weak policy argument that the BLBA's remedial nature instructs courts to interpret the provisions favorably towards coal miners. App. 18a. There is no favorable or unfavorable interpretation of the clear Congressional directive of 30 U.S.C. § 932(f). Congress

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steam locomotive. His condition was diagnosed only in the weeks after he became too ill to work. The Court was reluctant to charge Urie with the "unknown and inherently unknowable" and held that because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under the Federal Employers' Liability Act until his disease manifested itself. 337 U.S. at 169-170.

imposed clear penalties for obtaining and withholding medical opinions by applicants such as Mr. Williams. The Solicitor General previously argued before this Court, that the time limits protected coal mine operators from impermissible retroactive application of the BLBA. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 n. 14 (1976). These unambiguous limits waived for no other reason than their implementation would mandate denial of the claim.

To hold a medical determination later must be deemed to be a misdiagnosis of pneumoconiosis by virtue of a superceding denial of benefits and as such it cannot trigger the statute of limitations for subsequent claims, rewrites the clear and unequivocal language in the statute rendering it meaningless. This must be rejected as an effort to reinterpret a time limit specified by Congress. *See* Duncan v. Walker, 533 U.S. 167, 174-76 (2001)(rejecting a construction that would otherwise render the statute meaningless).

When Congress has directly spoken to the precise question at issue and the intent of Congress is clear, that is the end of the matter. A court, as well as an agency, must give effect to the unambiguously expressed intent of Congress. Chevron, U.S.A., Inc., v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-43 (1984). The legal question before a court is to determine whether the statute speaks clearly to the precise question at issue, and if so, the court must give effect to the unambiguously expressed intent of Congress. Only when the statute is silent or ambiguous with respect to the specific issue must the court sustain the agency's interpretation if it is based on a permissible construction of the statute. Barnhart v. Walton, 535 U.S. 212, 218-19 (2002).

The will of Congress is clear in 30 U.S.C. § 932(f). In Williams, the Fourth Circuit frustrates the clear intent of Congress by holding that a medical determination later deemed to be a misdiagnosis by virtue of a superceding denial of benefits cannot trigger the time limits for subsequent claims even when that medical determination was never considered by the administering agency. Such an obvious departure from the plain language of the statute is inconsistent with another panel of the Fourth Circuit as well as the published decisions of Sixth and Tenth Circuits.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit improperly deviates from the plain meaning of an unambiguous statute refusing to apply the statute of limitations fearing that it would result in "inherit unfairness." Such an interpretation of the plain meaning of an unambiguous statute is unsupported by the language of the Black Lung Benefits Act and the decisions of this Court. Such an interpretation exposes coal mine operators to needless liability in black lung claims which Congress has instructed to be time barred. For these reasons, the Petitioner, Consolidation Coal Company, respectfully submits that its Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By Counsel

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-2108/04-756-BLA

[Filed September 8, 2006]

CONSOLIDATION COAL COMPANY Petitioner	)
v.	)
BILLY D. WILLIAMS; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondents	)

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Motz, Judge Gregory, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-2108

[Filed July 13, 2006]

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

BILLY D. WILLIAMS; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Before MOTZ, GREGORY, and DUNCAN, Circuit Judges. Judge Gregory wrote the opinion, in which Judge Motz and Judge Duncan joined.

OPINION

GREGORY, Circuit Judge:

Consolidation Coal Company ("Consolidation") petitions for review of a final decision issued by the Benefits Review Board ("Board") of the Department of Labor ("DOL") affirming an award of black lung benefits by an

Administrative Law Judge ("ALJ") to Billy D. Williams under the Federal Coal Mine Health & Safety Act of 1969 ("Act"), 30 U.S.C. § 901 *et seq*. For the reasons that follow, we affirm the Board's decision and deny the petition.

I.

Billy D. Williams was a coal miner for at least thirty years. In 1957, Williams began his employment as a mechanic and welder in one of Consolidation's preparation plants. In his last position, he performed the same duties at one of Consolidation's outside coal mine shops from 1981 to 1987, at which point he retired due to shortness of breath.

On July 27, 1995, Williams filed his first claim for black lung benefits before the DOL. While the claim was pending, Dr. Jerome J. Lebovitz examined Williams on September 28, 1995, and sent a letter dated November 9, 1995 with attached reports to Williams's counsel. Dr. Lebovitz's letter stated his view that Williams was "permanently and totally disabled secondary to the entity of Coal Worker's Pneumoconiosis." J.A. 23. Despite receiving the letter, neither Williams nor his counsel sent it to the DOL.

At the DOL's request, Dr. Andrzej J. Jaworski examined Williams on October 30, 1995. Dr. Jaworski ultimately concluded that Williams's respiratory impairments would not prevent him from performing his position as a shop mechanic. Thereafter, on January 11, 1996, the DOL denied Williams's claim for benefits.

On June 6, 2001, Williams filed a second claim for black lung benefits. In connection with this claim, five physicians examined Williams. First, Dr. Prasad V. Devabhaktuni took x-rays of Williams's lungs on July 31, 2001, and diagnosed

Williams with hypertension, chronic obstructive pulmonary disease secondary to smoking, and coal worker's pneumoconiosis secondary to occupational dust exposure. During his deposition, Dr. Devabhaktuni testified that Williams's chronic obstructive pulmonary disease resulted primarily from his smoking habits, but that his coal mine dust exposure could have contributed to the impairment. In addition, Dr. Devabhaktuni stated that he diagnosed coal worker's pneumoconiosis based on the x-rays and Williams's occupational history.

Second, Dr. Joseph J. Renn, III examined Williams on October 31, 2001, and determined that Williams suffered from chronic bronchitis with obstruction secondary to cigarette smoking. Dr. Renn also concluded that coal mine dust exposure did not contribute to Williams's chronic bronchitis, and that Williams did not have pneumoconiosis. Finally, Dr. Renn opined that Williams would be able to perform his last position as a shop mechanic.

Third, Dr. John E. Parker performed pulmonary function studies on Williams, and reviewed the reports prepared by Drs. Devabhaktuni and Renn. In reviewing Williams's x-rays, Dr. Parker concluded that they did not establish pneumoconiosis. Nevertheless, Dr. Parker cited several studies in support of his view that "people with coal mine dust exposure may have airflow obstruction with a normal radiograph . . . ." J.A. 168. Based on these studies, Dr. Parker opined that people with pneumoconiosis could exhibit small opacities of the 0/1 type, and that it was unusual for an elderly patient such as Williams to have rounded changes of that nature. For these reasons, Dr. Parker concluded that Williams's lungs likely contained some macules of pneumoconiosis.

Dr. Parker further determined that Williams suffered from chronic obstructive pulmonary disease resulting from a "combination of tobacco smoke inhalation as well as work place dust exposure." J.A. 85. Dr. Parker admitted that it was impossible to apportion the cause of Williams's airflow obstruction between exposure to cigarette smoking or coal mine dust. However, Dr. Parker declined to rule out coal dust exposure as a cause of Williams's airflow obstruction using Dr. Renn's approach, which examined the mid-max expiratory flow rate, because, in Dr. Parker's view, the mid-max expiratory flow rate was an unreliable indicator subject to daily variance. Dr. Parker thus concluded that Williams's lung injury definitely arose, at least in part, from coal dust exposure "because he was a coal miner and . . . because his chest radiograph was not normal." J.A. 179. Ultimately, Dr. Parker opined that Williams's breathing impairment would prevent him from returning to his last position as a shop mechanic.

Fourth, Dr. David M. Rosenberg reviewed the medical reports prepared by Drs. Jaworski, Lebovitz, Devabhaktuni, and Renn, as well as readings performed by other physicians of an x-ray taken on October 31, 2001. As an initial matter, Dr. Rosenberg determined that the x-rays did not establish pneumoconiosis. Although Dr. Rosenberg noted some moderate obstruction in Williams's airways, he opined that this condition was due to tobacco smoke, and not coal mine dust exposure. Finally, because Williams's maximum voluntary ventilation (MVV) appeared normal, Dr. Rosenberg concluded that Williams could return to his previous coal mining position.

Fifth, Dr. Robert A.C. Cohen reviewed the medical reports prepared by Drs. Devabhaktuni, Renn, Parker, and Rosenberg, and conducted his own x-rays, physical exam, and

pulmonary function tests on July 15, 2003. Dr. Cohen concluded that Williams suffered from coal worker's pneumoconiosis based on the following considerations: (1) Williams's significant occupational exposure to coal mine dust for thirty-one years; (2) Williams's symptoms of chronic lung disease, which included "progressively worsening shortness of breath and cough and wheezing" and "sputum production"; (3) pulmonary function studies indicating moderate obstruction with diffusion impairment; (4) arterial blood gases showing mild hypoxemia; and (5) a chest x-ray indicating a positive reading for "opacities consistent with classical pneumoconiosis at a profusion of 1/0." J.A. 223. Dr. Cohen opined that even setting aside the x-ray evidence, he would still conclude that Williams demonstrated clinical and physiological signs of pneumoconiosis.

Dr. Cohen asserted that Drs. Renn, Rosenberg, and Jaworksi incorrectly concluded that coal mine dust exposure failed to contribute to Williams's obstructive lung disease. In citing several academic studies, Dr. Cohen argued that coal mine dust can cause significant airflow obstruction. Specifically, Dr. Cohen argued that these studies established a correlation between coal mine dust exposure and substantial decreases in lung function, forced vital capacity, forced expiratory volume in one second, forced expiratory flow, and carbon monoxide diffusion capacity. Ultimately, Dr. Cohen concluded that Williams's lung impairments would prevent him from performing his previous job as a shop mechanic.[1]

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[1] Dr. Rosenberg subsequently responded in a written rebuttal to Dr. Cohen's report. In this letter, Dr. Rosenberg attempted to discredit the scholarly citations provided by Dr. Cohen.

On September 11, 2003, the ALJ held a hearing on Williams's second claim for black lung benefits. Although the parties raised a host of evidentiary issues, the ALJ expressed its intention to admit the exhibits in their entirety, note the objections, and permit post-hearing motions to strike. Williams subsequently presented testimony in support of his claim. Immediately after the close of Williams's case, Consolidation moved for summary judgment, asserting that Williams's second claim was barred by the three-year time limitation triggered by Dr. Lebovitz's report under 20 C.F.R. § 725.308. The ALJ provisionally denied the motion with leave to renew the motion in post-hearing submissions.

The ALJ then addressed Williams's outstanding motion to compel with respect to fourteen interrogatories served prior to the hearing. Upon representation from counsel that Consolidation had disclosed all of the records relevant to the experts' diagnoses, Williams withdrew the motion to compel with respect to interrogatories one through four (which sought all x-rays, medical reports, and records relevant to Williams's case).

With respect to the remaining interrogatories, Consolidation argued that they were irrelevant and overly burdensome. In rejecting Consolidation's objection to Williams's interrogatory five, which sought the number of referrals Consolidation had made to Dr. Renn, the ALJ opined that it was relevant to "show bias and a number of referrals." J.A. 401. After Williams agreed to limit the interrogatory to referrals from Consolidation to its counsel, and to a time period of 1999 to 2002, the ALJ granted the motion to compel.

With respect to interrogatory six, which sought the number of cases in which Dr. Renn had found

pneumoconiosis, the ALJ and Consolidation became engaged in an increasingly heated exchange. Ultimately, in granting the motion to compel with respect to interrogatory six, the ALJ specifically stated "[t]his is discovery. I'm not making any findings." J.A. 410.

As the ALJ addressed interrogatories seven through fourteen, which addressed issues of bias for Drs. Renn and Rosenberg, Consolidation again asserted that the information sought was irrelevant to bias. In granting the motion to compel with respect to these interrogatories, the ALJ stressed that the discovery requests were "reasonable." J.A. 417.

Following the hearing, the ALJ issued a formal order dated December 9, 2003 explaining its reasons for compelling discovery. In that order, the ALJ stated that "[b]ased on many years of involvement in expert testimony as an examiner, cross examiner, and administrative law judge, I am convinced that doctors are no less biased by money and by longstanding relations with patients, law firms and the law firms' clients than is anyone else." J.A. 458. After noting that Dr. Renn testified frequently on behalf of coal mine companies for black lung cases--and specifically, in cases involving Consolidation's counsel--the ALJ determined that the probative value of the discovery relating to possible bias outweighed the burden of compliance. The ALJ reserved decision on Williams's motion to exclude the reports of Drs. Renn and Rosenberg.

After the Board denied Consolidation's interlocutory appeal of the ALJ's December 9, 2003 order, the ALJ issued a second discovery order dated March 2, 2004, directing Consolidation to release information responsive to interrogatories five through fourteen. On April 14, 2004, an en banc panel of the Board denied Consolidation's request for

reconsideration. Consolidation nevertheless refused to comply with the discovery orders and did not disclose any of the requested information.

On April 16, 2004, the ALJ denied Consolidation's renewed motion for summary judgment concerning the timeliness of Williams's second claim for black lung benefits, and set a briefing schedule regarding the benefits determination. After considering the parties' briefs, the ALJ issued its decision granting Williams black lung benefits on June 1, 2004. In its opinion, the ALJ resolved several preliminary matters that are relevant to the present petition for review. Specifically, the ALJ (1) granted Williams's motion to strike Dr. Lebovitz's report; (2) denied Consolidation's request to reassign the case to another judge; (3) denied Consolidation's third motion for dismissal based on the statute of limitations; and (4) declined to strike the reports of Drs. Renn and Rosenberg as a discovery sanction for Consolidation's noncompliance with the ALJ's December 9, 2003 and March 2, 2004 orders. The ALJ then expressed its intent to treat the reports proffered by Drs. Renn and Rosenberg "as if [Consolidation] had complied with discovery and as if its responses to that discovery had demonstrated significant bias by both witnesses toward employers as a class and [its law firm's] clients as a class." J.A. 490.

With respect to its merits determination, the ALJ credited the opinions of Drs. Parker and Cohen over the opinions of Drs. Renn and Rosenberg. In so doing, the ALJ made the following findings of fact: (1) Dr. Parker had credentials that were superior to those of Drs. Renn and Rosenberg; (2) the opinions of Drs. Cohen and Parker were more reasoned and persuasive than the opinions of Drs. Renn and Rosenberg; (3) Drs. Renn and Rosenberg did not exhibit a contemporary knowledge of medical research; and (4) Drs. Renn and

Rosenberg misunderstood the heavy-lifting aspects of Williams's work.

On August 8, 2005, the Board affirmed the ALJ's disposition of the matter in its entirety. Consolidation has petitioned for review of the Board's decision, asserting that (1) Williams's second claim for benefits was untimely; (2) the ALJ was biased against Consolidation and coal mine companies in general; (3) the ALJ abused its discretion in making certain discovery and evidentiary rulings; and (4) the ALJ improperly credited the opinions of Drs. Cohen and Parker in awarding benefits to Williams.

II.

A.

We apply de novo review to the legal conclusions made by the Board and the ALJ. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 186 (4th Cir. 2002). In addition, we engage in an independent review of the record to determine whether substantial evidence exists to support the ALJ's findings of fact. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000). Substantial evidence is "'more than a mere scintilla.'" *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). Specifically, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 528 (internal quotation marks and citations omitted).

B.

Consolidation first contends that Williams's black lung claim, which was filed more than three years after he received

Dr. Lebovitz's diagnosis of totally disabling coal worker's pneumoconiosis, was untimely. Section 932 of Title 30 provides that any claim for benefits "shall be filed within three years after whichever of the following occurs later--(1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. § 932(f). The implementing regulation, 20 C.F.R. § 725.308, further explains that the three-year statute of limitations is triggered when the miner receives a medical determination of total disability arising from pneumoconiosis:

> A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.

20 C.F.R. § 725.308(a).

The facts of this appeal present an unusual situation in which Williams received Dr. Lebovitz's diagnosis in 1995, but failed to submit that diagnosis prior to the DOL's ultimate denial of his first claim for black lung benefits in 1996. Thereafter, Williams filed his second claim for benefits in 2001--six years after he learned of Dr. Lebovitz's diagnosis. Thus, we must determine, as a threshold matter, whether Williams's receipt of Dr. Lebovitz's report triggered the three-year statute of limitations for his second claim.

This issue of first impression causes us to consider our en banc decision in *Lisa Lee Mines v. Director, Office of Workers' Compensation Programs*, 86 F.3d 1358 (4th Cir.

1996), which discussed the appropriate standard applied to a miner's subsequent claim for black lung benefits in light of a prior denial of benefits. In *Lisa Lee Mines*, we recognized the finality considerations that attach to a prior denial of black lung benefits. *Id.* at 1361 (holding that a prior denial of benefits is "'final' in a legal sense"). Specifically, the legal conclusion attendant with a prior denial--i.e., that the miner was not eligible for benefits at the time of that decision--must be accepted as correct and "is as off-limits to criticism by the respondent as by the claimant." *Id.* This rule of finality, we reasoned, is responsive to the general difficulty in accurately diagnosing pneumoconiosis:

> Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical--perhaps the only practical--way to discern a concrete form in the mists of the past. The ease we might feel at second-guessing *this* final judgment ought not tempt us to overestimate our retrospective perspicacity; most black lung claims involve a mixed bag of test results and wildly divergent medical opinions. The final decision of the ALJ (or BRB or claims examiner) on the spot is the best evidence of the truth at the time.

Id.

Because a prior denial is both final and correct, *Lisa Lee Mines* rejected the test articulated by the Seventh Circuit in *Sahara Coal Co. v. Director, Office of Workers' Compensation Programs*, 946 F.2d 554 (7th Cir. 1991), which required the miner to show that he "did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first

application." *Id.* at 556. In so doing, we reasoned that *Sahara Coal* improperly "permit[ted]--in fact demand[ed]--a plenary review of the evidence behind the first claim" by forcing the miner to affirmatively prove that each of the ALJ's adverse determinations underlying the prior denial was correct. *Lisa Lee Mines*, 86 F.3d at 1363. To accommodate the finality considerations that attach to a prior denial, we instead adopted a standard that presumed that the factual determinations underlying a prior denial are correct and simply required the miner to disprove the "continuing validity" of at least one of the elements previously adjudicated against him in showing a material change in conditions. *Id.*

Although *Lisa Lee Mines* primarily addressed the appropriate test applied to subsequent claims, the principles of finality expressed within the decision clearly bear on this appeal. In light of *Lisa Lee Mines*, we must accept the DOL's denial of Williams's first claim in 1996 as final and correct, regardless of whether the DOL reviewed Dr. Lebovitz's diagnosis in adjudicating the claim. For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's pneumoconiosis as of January 11, 1996 necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we must treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim, we must similarly conclude that the (mis) diagnosis had no effect on the statute of limitations for his second claim. *See Wyoming Fuel Co. v. Director, Office of Workers' Comp. Programs*, 90 F.3d 1502, 1507 (10th Cir. 1996) ("[A] final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and *renders prior*

medical advice to the contrary ineffective to trigger the running of the statute of limitations." (emphasis added)).

Our conclusion is consistent with the Act's view of pneumoconiosis, its treatment of subsequent claims, and its remedial purpose. First, the Act explicitly recognizes that pneumoconiosis is a "latent and progressive disease. . . ." 20 C.F.R. § 718.201(c). Based on this understanding of pneumoconiosis, we have acknowledged that "nothing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will." *Lisa Lee Mines*, 86 F.3d at 1362. *See also id.* ("The health of a human being is not susceptible to oncein-a-lifetime adjudication." (citing treatise)); *id.* at 1364 ("[Pneumoconiosis] is a progressive disease, and no rational system of law or of medicine could stand on the proposition that it can or must be measured only once."). Although Consolidation relies on certain dicta expressed in the Sixth Circuit's decision in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 (6th Cir. 2001), which suggests that misdiagnoses can trigger the statute of limitations for subsequent claims,[2] the progressive

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[2] Specifically, the Sixth Circuit stated in *Tennessee Consolidated Coal*:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and . . . the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately

nature of the disease dictates that "a claimant must be free to reapply for benefits if his first filing was premature." *Sharondale Corp. v. Ross*, 42 F.3d 993, 996 (6th Cir. 1994). We see no reason why a miner who has been denied benefits because he presented legally insufficient medical evidence must be forever barred from bringing a new claim even if he later develops pneumoconiosis. *See Wyoming Fuel*, 90 F.3d at 1507 ("[A] claimant should not be barred from bringing a duplicate claim when his or her first claim was premature because the claimant's conditions had not yet progressed to the point where the claimant met the Act's definition of total disability due to pneumoconiosis." (internal citations omitted)).

Second, the Act's treatment of subsequent claims reveals the inherent unfairness in running the statute of limitations based on Dr. Lebovitz's diagnosis. In balancing the Act's view of pneumoconiosis as a latent and progressive disease with the need for administrative repose, the duplicate claims regulation, 20 C.F.R. § 725.309(d), directs that subsequent claims "shall be denied" based on the earlier denial unless the

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> deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. . . . Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Tennessee Consol. Coal, 264 F.3d at 608 (footnote omitted). A different panel of the Sixth Circuit later disavowed this dicta in an unpublished disposition. *Peabody Coal Co. v. Director, Office of Workers' Comp. Programs*, 48 Fed. Appx. 140, 147 (6th Cir. Oct. 2, 2002).

miner demonstrates a material change in conditions. Under *Lisa Lee Mines's* construction of § 725.309(d), the miner must "*prove*, under all of the probative medical evidence of his condition *after* the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines*, 86 F.3d at 1362.[3] Thus, only new evidence *following* the denial of the previous claim, rather than evidence predating the denial, can sustain a subsequent claim. *Id. See also Wyoming Fuel*, 90 F.3d at 1509 ("In considering whether a claimant established a material change, the ALJ can consider only new evidence which relates to the conditions at the time of the second claim."); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 316 (3d Cir. 1996) ("If [the miner's] earlier exposure to coal dust caused his present disability and pneumoconiosis was merely latent at the time of his initial application for benefits but has since become manifest, [the miner] would be entitled to prove that the disease has progressed to the point of total disability since the filing of his original claim."); *Sharondale*, 42 F.3d at 996 ("[T]he claimant cannot prevail on a duplicate claim unless he shows a 'material change' in his condition; thus, the critical evidence in assessing whether to reopen the claim is the evidence accruing since the previous denial.").

In light of the standard articulated in *Lisa Lee Mines*, we note that Dr. Lebovitz's diagnosis, which related solely to Williams's condition in *1995*, could not have sustained a subsequent claim that his condition had materially worsened

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[3] In light of the fact that subsequent claims measure the miner's worsened condition after a prior denial, subsequent claims avoid res judicata issues because "common-law *res judicata* has no applicability where the issue is a person's health at two different times." *Lisa Lee Mines*, 86 F.3d at 1362 n.9.

since the initial denial of benefits in *1996*. It would be illogical and inequitable to hold that a diagnosis that could not sustain a subsequent claim could nevertheless trigger the statute of limitations for such a claim.

Third, the Act's remedial nature instructs us to interpret its provisions favorably toward miners. *See Labelle*, 72 F.3d at 318 ("[C]ourts should liberally construe remedial legislation, such as the [Act], so as to include the largest number of claimants within its entitlement provisions."). Keeping the remedial purpose in mind, we recognize that a rule holding that misdiagnoses could ultimately bar claims for benefits will create a substantial chilling effect discouraging miners from seeking early examinations and second opinions. *See Peabody Coal*, 48 Fed. Appx. at 147 ("If a miner knows that a misdiagnosis will ultimately mean that he can never again seek benefits should he eventually contract this progressive disease, he will be less likely to be proactive in seeking medical advice during the early stages."). The health consequences stemming from this chilling effect would be undoubtedly dire. Moreover, we are cognizant of the difficulty in accurately diagnosing pneumoconiosis. Thus, the rule we fashion today simply seeks to reconcile the "mixed bag of test results and wildly divergent medical opinions" usually attendant with black lung claims with the Act's remedial purpose of awarding benefits to deserving miners. *Lisa Lee Mines*, 86 F.3d at 1361.

We therefore hold that a medical determination later deemed to be a misdiagnosis of pneumoconiosis by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims. Applying this rule to the facts of this appeal, we find that Dr. Lebovitz's diagnosis did not trigger the statute of limitations for Williams's second claim. Moreover, having no further objections from

Consolidation, we presume that Williams's second claim was otherwise timely. 20 C.F.R. § 725.308(c) (setting forth a rebuttable presumption that the miner's claim was timely). Accordingly, we conclude that Williams's second claim was timely.

C.

Having disposed of the timeliness issue, we turn to Consolidation's assertion that the Board improperly affirmed the ALJ's decision declining to recuse itself from the case. Specifically, Consolidation argues that the ALJ's comments at the hearing and within the discovery order demonstrated its bias against coal mine companies. We find no merit in these contentions.

The Supreme Court has explained that bias in judicial decisionmaking refers to "a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate* either because it is undeserved, . . . rests upon knowledge that the subject ought not to possess[,] . . . [or] is excessive in degree . . . ." *Liteky v. United States*, 510 U.S. 540, 550, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). In this context, the Court set forth the standard for finding judicial bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a

> bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555.

Here, the challenged remarks followed Consolidation's objection to Williams's interrogatory six, which sought the number of cases in which Dr. Renn had diagnosed pneumoconiosis. The ensuing colloquy between Consolidation's counsel and the ALJ proceeded as follows:

COUNSEL:	Judge, that's impossible for me to determine without doing [sic] back through every client.
JUDGE CAMPBELL:	Well then, you're going to have to do it.
COUNSEL:	What does that show us? That doesn't show us anything.
JUDGE CAMPBELL:	It shows bias. Come on, [Counsel], you know that.
COUNSEL:	No, it doesn't.
JUDGE CAMPBELL:	*This area of the law is shot through with hacks. And I'm frankly tired of it.*

COUNSEL:	*Judge, are you calling Dr. Renn a hack?*
JUDGE CAMPBELL:	*No. But he might be. He perfectly well might be.*
COUNSEL:	No.
JUDGE CAMPBELL:	And this is what we're trying to find out.
COUNSEL:	No.
JUDGE CAMPBELL:	Stop arguing. I've let you go as far as I'm going to let you go. That's it.
COUNSEL:	Your Honor?
JUDGE CAMPBELL:	No. You're getting me upset now.

J.A. 408-09 (emphases added). In its written order granting Williams's motion to compel, the ALJ expressed its concern that "[b]ased on many years of involvement in expert testimony as an examiner, cross examiner, and administrative law judge, I am convinced that doctors are no less biased by money and by longstanding relations with patients, law firms and the law firms' clients than is anyone else." J.A. 458. After noting that Drs. Renn and Rosenberg testified frequently on behalf of coal mine companies, *see* J.A. 458-

59,[4] the ALJ determined that Williams's requested discovery related to bias was appropriate.

In our view, the ALJ's comments express the unremarkable proposition that experts can be biased, and that doctors in coal mine cases are no less subject to bias than other experts. *See Woodward v. Director, Office of Workers' Comp. Programs*, 991 F.2d 314, 321 (6th Cir. 1993) ("[E]xperts hired exclusively by either party tend to obfuscate rather than facilitate a true evaluation of a claimant's case."). *See also Grizzle v. Picklands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 1101 (4th Cir. 1993) (Hall, J., dissenting) ("Disability, or the lack thereof, seems inevitably in the eye of the *paid* beholder." (emphasis added)). Upon representation from counsel, the ALJ properly determined that the frequency with which Drs. Renn and Rosenberg testified on behalf of coal mine companies justified discovery concerning potential bias. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997) ("[T]he ALJ should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, *and their freedom from irrelevant distractions and prejudices.*" (emphasis added)); *id.* ("[T]he ALJ should consider whether an opinion was, to any degree, the product of bias in favor of the party retaining the expert and paying the fee.").

Similarly, the tone and tenor of frustration expressed in the ALJ's comments do not, in and of themselves, establish bias against Consolidation. *Liteky*, 510 U.S. at 555-56 ("*Not* establishing bias or partiality, however, are expressions of

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[4] The ALJ also noted that Dr. Renn frequently submitted reports on behalf of Consolidation's counsel. J.A. 458.

impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display."). At the outset of the hearing, the ALJ stated that it did not want to resolve the evidentiary issues without written submissions. Consolidation nevertheless repeatedly raised outstanding discovery issues, including Williams's motion to compel with respect to its interrogatories seeking discovery related to bias. Throughout the discussion of these interrogatories, Consolidation interrupted the ALJ, continued to press objections, and reiterated its position that the requested discovery was not relevant. Given counsel's behavior, it is not surprising that the ALJ became annoyed. *Liteky*, 510 U.S. at 556 (" A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.").

Finally, we note that, to the extent that Consolidation challenges the discovery order itself as indicative of bias, "judicial rulings alone almost never constitute a valid basis for a bias or partiality ruling." *Liteky*, 510 U.S. at 555 (internal citation omitted). Accordingly, we affirm the Board's determination that the ALJ did not demonstrate bias against Consolidation or coal mine companies in general.

D.

Consolidation further challenges several discovery and evidentiary rulings made by the ALJ. Specifically, Consolidation argues that the ALJ erred by (1) reserving ruling on and later granting Williams's discovery requests even though they sought irrelevant information, imposed burdensome costs, and were untimely; (2) striking Dr. Lebovitz's diagnosis from the record and substituting Dr.

Cohen's report; and (3) applying an adverse inference to the reports submitted by Drs. Renn and Rosenberg as a discovery sanction and excluding their supplemental reports. We shall address each contention *seriatim*.

1.

Consolidation first contends that the ALJ's decision to reserve ruling on Williams's motion to compel deprived it of a meaningful hearing. We disagree. Section 725.455 of Title 20 of the Code of Federal Regulations provides that "[t]he conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing." 20 C.F.R. § 725.455. No statute or regulation, however, requires an administrative law judge to rule on discovery motions prior to the merits hearing. In light of the considerable discretion afforded to administrative law judges in conducting hearings, we decline to find error in the ALJ's decision to reserve ruling on Williams's motion.

We similarly find no abuse of discretion with respect to the ALJ's decision to grant Williams's motion to compel. As discussed above, the ALJ properly determined that discovery concerning potential bias was relevant to impeaching the credibility of Drs. Renn and Rosenberg. Moreover, Consolidation has failed to offer anything more than conclusory assertions regarding the potentially burdensome aspect of the discovery requests, despite having numerous opportunities to substantiate its objections before the ALJ.

In addition, we reject Consolidation's remaining argument that the ALJ could not grant the motion to compel because the requested discovery would be untimely and therefore

inadmissible under 20 C.F.R. § 725.456(b). Section 725.456(b) provides that where a party seeks to admit documentary evidence that was not exchanged twenty days prior to the hearing and cannot establish good cause for its lateness, the ALJ shall exclude the evidence or remand to the district director for consideration of the evidence. In this instance, however, *Consolidation* never disclosed the requested discovery even though Williams served the interrogatories on July 11, 2003--two months prior to the hearing. Consolidation's own recalcitrance in refusing to disclose the requested discovery therefore created any untimeliness issues. Accordingly, we conclude that the ALJ properly exercised its discretion in granting Williams's motion to compel.

2.

Consolidation next argues that the ALJ abused its discretion by permitting Williams to substitute Dr. Cohen's medical report for Dr. Lebovitz's medical report. Considering that 20 C.F.R. § 725.414 limits a miner to submitting two medical reports in support of his claim, we believe that the ALJ properly permitted Williams to designate the two reports (out of the three filed) he wished to submit in support of his claim. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (BRB 2004) (en banc) (holding that "the administrative law judge acted within his discretion when he permitted employer to select which two of its three medical reports employer would submit as its affirmative case").[5] We therefore find that the

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[5] We further note, as the Board pointed out, that because the ALJ addressed Dr. Lebovitz's report in connection with the timeliness issue, Consolidation was not unduly prejudiced by the exclusion of the report.

ALJ did not abuse its discretion in striking Dr. Lebovitz's report and admitting Dr. Cohen's report in its place.

3.

Consolidation further maintains that the ALJ erred in applying an adverse inference of bias to the reports of Drs. Renn and Rosenberg. Significantly, however, Consolidation has not challenged the ALJ's *other* reasons for discrediting Drs. Renn and Rosenberg. These reasons were articulated as follows: (1) Dr. Parker had credentials that were superior to those of Drs. Renn and Rosenberg; (2) the opinions of Drs. Cohen and Parker were more reasoned and persuasive than the opinions of Drs. Renn and Rosenberg; (3) Drs. Renn and Rosenberg did not exhibit a contemporary knowledge of medical research; and (4) Drs. Renn and Rosenberg misunderstood the heavy-lifting aspects of Williams's work. Thus, with or without the application of the adverse inference, the ALJ had proper reasons for finding that the reports proffered by Drs. Renn and Rosenberg were unpersuasive.

In addition, Consolidation has failed to provide any indication that the supplemental reports proffered by Drs. Renn and Rosenberg would have cured the defects the ALJ found in their original reports. Accordingly, we find that any errors concerning the ALJ's consideration of the reports proffered by Drs. Renn and Rosenberg were harmless.[6] *See Ngarurih v. Ashcroft*, 371 F.3d 182, 190 n.8 (4th Cir. 2004) (reversal of an administrative ruling is unnecessary if the error was harmless).

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[6] In addition, any error arising from the exclusion of x-ray rebuttal evidence is harmless because the ALJ determined that the x-ray evidence did not establish medical pneumoconiosis.

E.

Finally, Consolidation raises several challenges to the ALJ's factual findings underlying its ultimate award of benefits to Williams.[7] These contentions are without merit.

Consolidation first contends that the ALJ failed to express the weight afforded to Dr. Devabhaktuni's opinion. However, the record demonstrates that the ALJ explicitly discredited Dr. Devabhaktuni's opinion because he "seemed to have been testifying in terms of total disability for purposes of Social Security benefits entitlement . . . ." J.A. 494. Thus, this argument is unsupported by the record.

Consolidation next asserts that Dr. Parker's failure to apportion Williams's lung impairment between cigarette smoke and coal mine dust exposure discredited his medical report. Although Dr. Parker could not establish the precise percentage of Williams's lung obstruction attributable to cigarette smoke and coal mine dust exposure, "doctors need not make such particularized findings." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001). *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (holding that the miner "was not required to demonstrate that coal dust was the *only* cause of his current respiratory problems"); *Consol. Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237-38 (4th Cir. May 11, 2004) (same). Indeed, "[t]he ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability. "*Freeman United Coal Mining*, 272 F.3d at 483. *See also* 20 C.F.R. § 718.201(b)

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[7] Because Williams filed his claim in 2001, his claim is subject to the permanent regulations set forth in 20 C.F.R. § 718 *et seq*.

(the miner is required to show that his lung disease was "significantly related to, or substantially aggravated by," coal mine dust exposure).

Although Dr. Parker acknowledged that either cigarette smoking or coal mine dust could have caused Williams's airflow obstruction, he explained that the mid-max expiratory rate, the factor upon which Dr. Renn relied to rule out coal mine dust as a potential cause of Williams's airflow obstruction, was an unreliable variable. In addition, Dr. Parker supported his view that coal mine dust contributed to Williams's airflow obstruction by citing four types of scientific studies: (1) studies comparing lung function in miners and non-miners; (2) studies of the patterns of lung functions and symptoms related to the miner's level of coal mine dust exposure; (3) studies of the mortality rate from chronic obstructive pulmonary disease due to coal mine dust exposure; and (4) autopsy studies of the relationship between emphysema in coal miners with their previous exposure to coal mine dust. Dr. Parker further substantiated his conclusion that Williams had suffered totally disabling coal worker's pneumoconiosis by relying on the rounded abnormalities apparent on Williams's x-rays, the pulmonary function studies and diffusion capacity test, and Williams's extensive history of coal mine employment.

We believe that the ALJ properly relied on Dr. Parker's well-reasoned report in determining that Williams was entitled to black lung benefits. Any error arising from the ALJ's reliance on additional sources, such as Dr. Cohen's report, was therefore harmless. Accordingly, we find that the ALJ's benefits determination is supported by substantial evidence, and affirm the award.

III.

We agree with the Board's determination that the ALJ committed no errors of law and made findings of fact supported by substantial evidence. We also conclude that the award of black lung benefits to Williams was appropriate, and therefore deny Consolidation's petition in its entirety.

PETITION DENIED

APPENDIX C

U.S. DEPARTMENT OF LABOR

BRB No. 04-0756 BLA

[Filed August 8, 2005]

BILLY D. WILLIAMS Claimant-Respondent	)
v.	)
CONSOLIDATION COAL COMPANY Employer-Petitioner	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)

Appeal of the Decision and Order of
Fletcher E. Campbell Jr., Administrative Law Judge,
United States Department of Labor.

Before: SMITH, HALL, and McGRANERY, Administrative Appeals Judges.

DECISION and ORDER

Employer appeals the Decision and Order (03-BLA-5329) of Administrative Law Judge Fletcher E. Campbell, Jr. awarding benefits on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Employer appeals, challenging the administrative law judge's procedural rulings with respect to discovery and the admissibility of evidence on the ground that the administrative law judge was biased against employer's counsel and medical experts. Employer, however, does not raise any allegation of error with respect to the weight the administrative law judge accorded its medical experts on the issues of entitlement. Claimant and the Director, Office of Workers' Compensation Programs (the Director), filed response briefs, urging the Board to reject all of employer's arguments as without merit. They assert that the administrative law judge acted properly, and that his decision awarding benefits should be affirmed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to understand the issues raised on appeal, it is necessary to set forth a detailed history of the litigation. The record reflects that claimant filed a subsequent claim on June

6, 2001.[1] Director's Exhibit 3. The district director issued a Proposed Decision and Order - Award of Benefits on May 8, 2002. Employer requested a hearing, which was scheduled for September 11, 2003. Prior to the hearing, claimant served on employer a set of fourteen interrogatories and a request for production of documents, by which claimant sought to obtain information about the financial relationship between employer and its medical experts, Drs. Renn and Rosenberg.[2] On

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[1] Claimant first filed a claim for benefits on July 27, 1995. Director's Exhibit 1. The Department of Labor sent claimant for a complete pulmonary evaluation with Dr. Jaworski, who opined that claimant did not suffer from pneumoconiosis and that he was not totally disabled by a respiratory or pulmonary impairment. *Id.* Claimant was subsequently examined, on his own accord, by Dr. Lebovitz on September 28, 1995. *Id.* Apparently a copy of Dr. Lebovitz's November 9, 1995 report, finding claimant to be totally disabled due to pneumoconiosis, was never provided to the district director. Thus, at the time of the district director's denial of the claim on January 11, 1996, Dr. Lebovitz's report was not of record. The district director denied the first claim on the grounds that claimant failed to establish the existence of pneumoconiosis, and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

[2] Interrogatories 1-4 concerned medical reports employer had in its possession that had not yet been submitted. Interrogatories 5-14 specifically asked how many referrals for examination or consultation employer had made to Drs. Renn and Rosenberg in the last four years, the number of cases in which each physician had found the existence of pneumoconiosis, the number of cases in which the physician had found that the pneumoconiosis was too insignificant to have caused any impairment, the number of such cases in which the physician had found that a miner's coal mine dust exposure had contributed to a miner's obstructive airways impairment, the amount of money paid to each physician in the

August 18, 2003, employer responded in part to the interrogatories, disclosing the amount of money that had been paid by employer to Dr. Renn and Dr. Rosenberg for their opinions in this case. Employer refused to answer the remaining interrogatories and filed objections with the administrative law judge. On September 3, 2003, claimant filed a motion to compel discovery and a motion to exclude the supplemental consultative reports of Dr. Renn dated June 25, 2003 and of Dr. Rosenberg dated June 27, 2003, marked for identification as Employer's Exhibits 7 and 8.

At the September 11, 2003 hearing, the parties discussed their objections to various exhibits, and the administrative law judge provisionally admitted Director's Exhibits 1-45, four proposed Claimant's Exhibits and nine proposed Employer's Exhibits. Judge Campbell granted employer's request to obtain one rebuttal report from either Dr. Renn or Dr. Rosenberg post-hearing in response to claimant's submission of Dr. Cohen's July 15, 2003 report, marked as Claimant's Exhibit 3. Hearing Transcript at 100-104. Employer was also granted the opportunity to obtain a reading of the July 15, 2003 x-ray upon which Dr. Cohen relied. *Id.* The administrative law judge ordered that the parties file any necessary motions to strike evidence within thirty days of the hearing, with responses to such motions to be filed within an additional twenty days.[3] Hearing Transcript at 93-96.

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instant case, and the total amount of money each physician had been paid by employer in the last four years for preparation of reports and testimony.

[3] On September 29, 2003, employer's counsel submitted a letter identifying the evidence submitted in support of its affirmative case. Claimant subsequently filed a motion to strike evidence on October 14, 2003.

With respect to the motion to compel discovery, claimant withdrew Interrogatories 1-4. The administrative law judge made some modifications to Interrogatories 5-14, and indicated that he was inclined to grant the discovery request, but reserved his ruling.[4] Hearing Transcript 74-93. Following claimant's hearing testimony, employer moved to dismiss the claim on the ground that it was not timely filed within three years of Dr. Lebovitz's advising claimant that he was totally disabled due to pneumoconiosis. *See* Hearing Transcript at 43-44, 55. The administrative law judge denied the motion but stated that employer could further address the issue in a post-hearing brief.

The administrative law judge issued an Order Granting Claimant's Motion to Compel on December 9, 2003. *See* ALJ Order dated December 9, 2003. The administrative law judge gave employer until January 30, 2004 to provide the requested information. On January 28, 2004, employer filed an appeal with the Board. The Board dismissed this appeal as interlocutory. *Williams v. Consolidation Coal Co.*, BRB No. 04-0389 BLA (Feb. 24, 2004). Upon notice of the Board's dismissal order, the administrative law judge issued an order compelling discovery and setting a schedule for the filing of responses and replies. Employer next submitted a request for reconsideration *en banc* with the Board, which was granted.

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[4] Upon representation by employer's counsel that employer had no medical opinions in its files that had not been divulged, claimant withdrew his motion to compel responses to Interrogatories 1-4. With respect to Interrogatories 5-14, the administrative law judge limited discovery to include only information obtained from those cases where Jackson Kelly represented Consolidation Coal Company and there was a medical referral to Drs. Renn and/or Rosenberg. Hearing Transcript at 76, 78; ALJ Order dated December 9, 2003.

The Board, however, ultimately determined that employer's appeal failed to meet the criteria for granting review of an interlocutory appeal, and therefore, the appeal was dismissed. *See* Order on Reconsideration *En Banc*, BRB No. 04-0389 BLA (April 14, 2004) (unpub.).[5]

Employer next renewed its motion for summary judgment; relying on *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) to support its position that claimant's subsequent claim was untimely filed. In an Order dated April 16, 2004, the administrative law judge denied employer's motion, finding that, under *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), the Department of Labor's 1996 denial repudiated the 1995 medical determination by Dr. Lebovitz that claimant was totally disabled due to pneumoconiosis and "nullified the communication by Dr. Lebovitz insofar as its ability to trigger the running of the statue of limitations." ALJ Order dated April 16, 2004, slip op. at 2. The administrative law judge noted that, while the Department of Labor did not have Dr. Lebovitz's opinion before it when it originally denied benefits, he took "official notice of the fact that Dr. Lebovitz's opinion [was] unreasoned and undocumented and [thus] would almost

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[5] The Board distinguished this case from *Wood v. Elkay Mining Corp., BRB No. 03-0178 BLA* (Nov. 25, 2002 (unpub. Order), holding that employer had not identified considerations of the kind that led the Board to initially grant interlocutory review in *Wood*. *See* Order on Reconsideration *En Banc*, BRB No. 04-0389 BLA (April 14, 2004) (unpub.). The Board noted that the present case did not involve the rights of any third-party interveners, nor did employer allege that the administrative law judge failed to provide a discernible rationale for his decision to grant claimant's motion to compel discovery. *Id.*

certainly not have changed the Department of Labor's disposition of the claim." *Id.*

The administrative law judge issued a Decision and Order on June 1, 2004. The administrative law judge first addressed the parties' evidentiary motions. He granted claimant's motion to strike Dr. Lebovitz's November 9, 1995 report at Director's Exhibit 1, noting that claimant had elected to rely on the December 3, 2003 report from Dr. Parker and the July 15, 2003 report by Dr. Cohen in support of his affirmative case pursuant to 20 C.F.R. § 725.414(a)(2)(i). Claimant's Exhibits 1, 3; Decision and Order at 10. The administrative law judge struck Dr. Rosenberg's interpretation of an October 31, 2001 x-ray as it exceeded employer's two x-ray limit imposed by 20 C.F.R. § 725.414(a)(3)(i). Employer's Exhibit 5; Decision and Order at 10. The administrative law judge denied claimant's motion to strike Dr. Rosenberg's September 16, 2002 consultative report and curriculum vitae contained at Employer's Exhibits 4 and 5. Decision and Order at 10. Although the doctor had relied on inadmissible x-rays; the administrative law judge reasoned that since claimant acknowledged that the preponderance of the x-ray evidence was negative for pneumoconiosis, it was unlikely that Dr. Rosenberg's opinion would have changed if he had considered one or two fewer negative readings. *Id.* Additionally, the administrative law judge reversed his ruling at the hearing and granted claimant's motion to exclude the June 27, 2003 supplemental report of Dr. Renn and the June 25, 2003 supplemental report of Dr. Rosenberg, contained at Employer's Exhibits 7 and 8, which were proffered by employer "in response" to the January 22, 3003 report of Dr. Parker. *Id.* The administrative law judge noted that 20 C.F.R. § 725.414(a)(3)(ii) "does not permit rebuttal of a medical report offered by an opposing party." Decision and Order at 10-11. The administrative law judge denied claimant's motion

to strike Dr. Scott's reading of the October 31, 2001 x-ray, and instead, allowed Dr. Scott's reading to be substituted for Dr. Renn's reading of that same film. Director's Exhibit 36, Employer's Exhibit 2; Decision and Order at 10.

The administrative law judge next dismissed employer's allegation at the hearing that he was biased against Dr. Renn and further rejected employer's request that the case be reassigned to another judge.[6] Decision and Order at 11. He also reiterated his finding that the claim was timely filed. Decision and Order at 11-12. Lastly, the administrative law judge addressed employer's failure to comply with the discovery order, noting that he had the right to strike the medical opinions of Drs. Renn and Rosenberg. He decided, however, to take "the least Draconian approach" to employer's disregard of his procedural ruling, and therefore elected to treat the opinions of Drs. Renn and Rosenberg as if employer "had complied with discovery and as if its response to that discovery had demonstrated significant bias by both witnesses toward employers as a class and Jackson and Kelly clients as a class." Decision and Order at 12.

Turning to the merits of the case, the administrative law judge noted that claimant could establish a change in conditions pursuant to 20 C.F.R. § 725.309(d) by establishing either the existence of pneumoconiosis or that he was totally

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[6] Employer requested below that the administrative law judge recuse himself based on the administrative law judge's statement at the hearing that "this area of law is shot through with hacks and I am frankly tired of it" in addition to his observation that Dr. Renn "might be, he perfectly well might be a hack." Hearing Transcript at 81.

disabled by a respiratory or pulmonary impairment.[7] *Id.* The administrative law judge found that claimant established the existence of legal pneumoconiosis and that he was totally disabled due to pneumoconiosis based on the credible medical opinions of Drs. Cohen and Parker. Decision and Order at 12-18. The administrative law judge thus found that claimant established a change in conditions and his entitlement to benefits pursuant to 20 C.F.R. Part 718. Decision and Order at 18.

Employer raises several arguments on appeal. Employer maintains that the administrative law judge erred in denying its motion for summary judgment and in failing to find that claimant's subsequent claim was time barred pursuant to 20 C.F.R. § 725.308. Employer's Brief at 6-15. Employer alleges bias on the part of the administrative law judge in ruling on claimant's motion to compel answers to interrogatories, and that the administrative law judge improperly sanctioned employer for failing to respond to discovery by applying an adverse inference against employer's medical experts. Employer's Brief at 15-33. Employer asserts that it was denied its right to due process and a full and fair hearing on the issues presented in the case. *Id.* Specifically, employer notes that, at the time of closing arguments the parties did not know which exhibits were of record, and as a result, employer could not adequately prepare its closing argument brief or raise meaningful objections to the evidence admitted. Employer's Brief at 19. Employer also asserts that the administrative law judge erred in allowing claimant to alter the evidence in the Director's Exhibits by withdrawing the report of Dr. Lebovitz, contained

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[7] The administrative law judge incorrectly references this discussion under the heading of "Modification." Decision and Order at 12.

at Director's Exhibit 1, as one of claimant's two permitted reports in support of his affirmative case. Employer's Brief at 49-50. On the merits of entitlement, employer also alleges that the administrative law judge failed to explain the weight accorded the medical opinions of Drs. Devabhaktuni, Parker, and Cohen. Employer's Brief at 50-54. Employer further argues that Dr. Cohen's report should have been stricken from the record as it was proffered by claimant in excess of the evidentiary limitations of 20 C.F.R. § 725.414. Employer's Brief at 53.

Claimant contends that all of employer's arguments should be rejected. The Director argues specifically that claimant's subsequent claim was timely filed, and that the administrative law judge acted within his discretion in the issuance of his procedural rulings. Director's Brief at 13. The Director asserts that, while the administrative law judge indicated his frustration at the hearing with employer's refusal to comply with discovery, employer has failed to carry its burden of proving that the administrative law judge's ruling was biased. Director's Brief at 15. The Director maintains that the administrative law judge appropriately allowed claimant to designate its medical experts, and further notes that Dr. Lebovitz's excluded opinion was nonetheless considered by the administrative law judge with respect to the timeliness issue. Director's Brief at 21-23. Finally, the Director asserts that the administrative law judge's decision to impose sanctions was within his authority. The Director states that employer has failed to demonstrate that it was prejudiced by the sanctions imposed by the administrative law judge since the administrative law judge properly rejected employer's expert opinions on the issues of entitlement for reasons other than bias. Director's Brief 23-30.

Statute of Limitations/Timeliness of Claim

We first address employer's assertion that the administrative law judge erred in finding the claim timely filed. Employer's Brief at 6-15. In this case, the administrative law judge determined that claimant's subsequent claim was timely filed because claimant did not receive a medical opinion of total disability due to pneumoconiosis *subsequent* to the district director's January 11, 1996 denial of his prior claim. Although employer advocates that the Board adopt the legal standard announced in *Kirk*, 264 F.3d at 602, 22 BLR at 2-288, the Board declines to apply *Kirk* in cases, such as the instant one, which arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[8] *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). Nevertheless, even if *Kirk* applied, the instant, subsequent claim must be considered to have been timely filed since the administrative law judge specifically rendered a finding that Dr. Lebovitz's opinion was unreasoned. The United States Court of Appeals for the Sixth Circuit acknowledged in *Kirk* that, in order to toll the statute of limitations, a claimant must receive a "reasoned" medical determination that he was totally disabled due to pneumoconiosis more than three years prior to filing his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Thus, regardless of the applicability of the time limitations, since claimant did not receive a reasoned communication from a physician, that he was totally disabled due to pneumoconiosis, the subsequent claim would not be time barred. *See Id.* We,

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[8] Because claimant's last coal mine employment occurred in West Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

therefore, affirm the administrative law judge's finding that claimant's subsequent claim was timely filed.

Conduct of the Hearing/Due Process Consideration.

Employer argues that it was denied its due process right to a fair hearing because the administrative law judge did not make his evidentiary rulings at the hearing, delaying his final ruling on various motions to exclude evidence until after receipt of written arguments by the parties, thereby preventing employer's counsel from making an effective closing argument. Employer's Brief at 19. Employer also asserts that the administrative law judge abused his discretion by delaying until the hearing his ruling on claimant's motion to compel employer's answers to interrogatories, which "prevented [employer] from asking for similar discovery about [claimant's] experts to show the same type of 'bias' the [administrative law judge] readily assumed to be present on behalf of the experts offering opinions at the request of [employer]." *Id.*

We disagree. The regulation at 20 C.F.R. § 725.455(c) provides that "The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing." 20 C.F.R. § 725.455(c). In order to establish a denial of due process in an administrative hearing there must be a showing of substantial prejudice, *see Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972). In this case, employer has not demonstrated any real prejudice to its case; therefore, its due process assertions are without merit.

We specifically reject employer's assertion that Judge Campbell compromised employer's right to due process because he notified the parties of his evidentiary rulings in his Decision and Order and not at the hearing. An administrative law judge has broad discretion in handling procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). An administrative law judge is also afforded discretion in dealing with matters of fairness and judicial efficiency. *See Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

At the hearing, Judge Campbell put the parties on notice of his provisional evidentiary rulings, and he acted reasonably when he decided to consider written arguments by the parties prior to ruling whether to exclude or admit certain items of evidence in accordance with 20 C.F.R. § 725.414. As the Director accurately points out, employer's counsel was not left completely in the dark about the record evidence when he prepared his brief. Director's Brief at 14. The administrative law judge specifically directed the parties to designate the medical reports on which they would rely in compliance with Section 725.414, and to also designate substitute evidence in the event that any particular piece of evidence was withdrawn or excluded. *Id.* The administrative law judge acted reasonably when he assumed that counsel was qualified to make "alternative assumptions in your brief, assuming that certain evidence is in, [and] certain evidence is out." Hearing Transcript at 11-12; Director's Brief at 14. Because we consider the administrative law judge's approach to have been reasonable given the parties' contentious exchange at the hearing, and since the administrative law judge has great discretion in the manner in which the hearing is conducted, *see Clark*, 12 BLR at 1-149, there is no basis for concluding

that employer was denied the opportunity for a fair hearing or that it was denied due process.[9]

Furthermore, employer's due process rights were not compromised because Judge Campbell did not rule on claimant's motion to compel discovery prior to the September 11, 2003 hearing. The record reflects that employer did not return its answers and objections to claimant's interrogatories until August 18, 2003, three weeks prior to the hearing. Claimant filed his motion to compel on September 3, 2003, eight days prior to the hearing. Given the abbreviated time frame, it was not unreasonable for the administrative law judge to reserve ruling on the motion to compel until he had had the opportunity to discuss the matter with the parties at the hearing. There is nothing in the Act or regulations that requires an administrative law judge to rule on discovery motions prior to the hearing on the merits. The record reflects that the administrative law judge not only provided employer the opportunity to be heard on its objections to discovery and on its motions in support of its position, he also agreed to narrow claimant's requests. At the hearing, employer failed to make a proffer to substantiate its assertion that responses to the interrogatories would be unduly burdensome. Hearing Transcript at 72-92. In the absence of such a proffer, the administrative law judge directed employer to answer the interrogatories as modified. *Id*. The administrative law judge more fully explained his ruling in subsequent Orders dated December 9, 2003 and March 2, 2004. We reject employer's contention that it was denied due process by the timing of the

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[9] We note that there is no right to file a closing argument brief, and the decision as to whether the parties are permitted closing argument briefs lies within the sound discretion of the administrative law judge. *See* 20 C.F.R. § 725.455(d).

administrative law judge's rulings because employer has failed to demonstrate any undue prejudice.[10]

Allegations of Bias

Employer contends that the administrative law judge's various rulings and comments revealed his "extraordinary bias" against employer and employer's counsel. Employer's Brief at 15. After careful consideration of the hearing transcript and the administrative law judge's Decision and Order, we are not persuaded that Judge Campbell displayed bias towards employer.

Prior to the hearing, claimant sought information from employer regarding its experts to determine whether they were biased. To this end, claimant served interrogatories on employer requesting information regarding the number of referrals employer had made to Drs. Renn and Rosenberg in an attempt to discover: whether the two physicians received a significant amount of income from employer based on referrals; whether they consistently rendered opinions favorable to employer's position; and whether they had ever diagnosed a claimant as totally disabled due to pneumoconiosis. Judge Campbell modified some of the interrogatories to employer's satisfaction, but also determined that the statistical information requested concerning the findings of Drs. Renn and Rosenberg in other federal black

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[10] Employer states that the administrative law judge's delaying in ruling on claimant's motion to compel prevented it from serving similar interrogatories on claimant. We note, however, that if employer had wished to serve similar interrogatories on claimant's counsel for the purpose of discovering bias with regard to claimant's medical experts, it was free to make that request at any time prior to the issuance of the Decision and Order.

lung cases was relevant to whether those physicians were biased, and that the relevancy of the discovery request outweighed any financial burden imposed on employer's counsel by producing the information. Hearing Transcript 74-92. The administrative law judge specifically rejected employer's assertion at the hearing that each interrogatory was irrelevant, unreasonable, and over-burdensome. *Id.* In addressing whether claimant's discovery request was reasonably calculated to lead to the discovery of admissible evidence, Judge Campbell acknowledged that doctors were not immune to developing bias as a result of financial incentive, making it necessary to ascertain whether they were financially motivated to render a diagnosis in favor of one party or another. ALJ Order dated December 9, 2003. The administrative law judge observed that he was not familiar with a case where Jackson Kelly represented a miner or where Dr. Renn testified for a claimant. *Id.* After considering the positions of both parties on this issue, Judge Campbell concluded that claimant's discovery request was reasonably calculated to lead to the discovery of admissible evidence, i.e., evidence indicating whether either Dr. Renn or Dr. Rosenberg was biased. *Id.* He thus issued an Order compelling employer to produce the requested financial information. ALJ Order dated December 9, 2003. In so doing, he was heeding the admonition of the United States Court of Appeals for the Fourth in *Underwood v. Elkay Mining Co*: "[T]he administrative law judge should consider whether an opinion was, to any degree, the product of bias in favor of the party retaining the expert[s] and paying the fee." *Underwood v. Elkay Mining Co.*, 105 F.3d 946, 951, 21 BLR 2-23, 32 (4th Cir. 1997).

Contrary to employer's assertion, Judge Campbell's discovery Order did not demonstrate bias. Adverse rulings in a proceeding are not by themselves sufficient to show bias on

the part of the administrative law judge. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). While employer is displeased with the result of the administrative law judge's discovery ruling, the granting of claimant's motion to compel, in and of itself, does not establish bias.

Furthermore, we reject employer's assertion that the administrative law judge's statements regarding Dr. Renn show that he is personally biased against employer's experts. Not long ago the United States Supreme Court reiterated the well-established law on judicial bias:

> Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994). This standard is applicable to administrative hearings. *Beiber v. Department of the Army*, 287 F.3d 1358, 1361 (Fed. Cir. 2002).

The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In the instant case, employer has not met that burden. Nothing in the tone or tenor of the administrative law judge's Decision and Order indicates that he retains "a deep seated favoritism or antagonism" that made it impossible for

him to render a fair judgment of the issues presented in this case. *Liteky,* 510 U.S. at 555. The administrative law judge's even-handed efforts to reach a resolution with respect to the discovery requests by claimant and objections by employer do not evince bias or partiality. Thus, employer has failed to demonstrate that the administrative law judge was biased against it. *See Liteky*, 510 U.S. at 555, *Beiber* 287 F.3d at 1361.

Application of an Adverse Inference of Bias

Employer argues that the administrative law judge's decision must be reversed because he improperly applied an adverse inference of bias against the opinions of Drs. Renn and Rosenberg based on employer's refusal to comply with his Order compelling discovery.[11] Review of the record belies this assertion. The administrative law judge noted that

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[11] An administrative law judge has authority to compel discovery and impose sanctions pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ) Rule 18.6(d)(2) which provides:

> If a party or an officer or agent of a party fails to comply with a [discovery order]...or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just.

OALJ Rule 18.6(d)(2). This section further permits the administrative law judge to "infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party." OALJ Rule 18.6(d)(2)(i).

he would discount employer's experts as biased only if he concluded that the opinions of Drs. Renn and Rosenberg were of equal weight to any contrary medical opinions. In other words, an adverse inference would aid claimant in carrying his burden of proof if the evidence were equally probative because the administrative law judge would apply the bias inference to diminish the weight of employer's evidence. Although the administrative law judge stated later in his opinion that he "discredit[ed] the opinions of Drs. Renn and Rosenberg because of [e]mployer's failure to comply with discovery orders...," he also stated emphatically: "Thus on the merits alone, I find that the opinions of Drs. Cohen and Parker should be credited over those of Drs. Renn and Rosenberg." Decision and Order at 16-17. He further concluded that: "The result and my principal findings in this case would be the same without the devaluation of the opinions of Drs. Renn and Rosenberg because of [e]mployer's failure to make discovery." Decision and Order at 17, n. 6.

In addressing whether claimant established the existence of legal pneumoconiosis, the administrative law judge properly assigned greater weight to the opinions of Drs. Parker and Cohen, who attributed claimant's respiratory impairment to a combination of smoking and coal dust exposure, because he found those physicians to be better qualified than Drs. Renn and Rosenberg, who opined that claimant had no coal dust-related respiratory or pulmonary impairment. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). The administrative law judge also properly credited the opinions of Drs. Parker and Cohen because he found their opinions were better reasoned than the opinions of Drs. Renn and Rosenberg. *See Clark,* 12 BLR at 1-149; Decision and Order at 13-14. Similarly, on the issue of total disability, the administrative law judge specifically rejected the diagnoses of

Drs. Renn and Dr. Rosenberg that claimant was not totally disabled for work due to a respiratory impairment, because the administrative law judge found that these physicians did not have an accurate understanding of the physical requirements of claimant's last coal mine job, which required heavy manual labor. Contrary to the suggestion of our dissenting colleague, the administrative law judge's determination that these physicians were biased did not taint his evaluation of their opinions on the merits. Employer has not even attempted to show that it has.

Because the administrative law judge properly rejected the opinions of Drs. Renn and Rosenberg for valid reasons other than bias, and because employer has not challenged those findings on appeal, we decline to address the propriety of the administrative law judge discovery rulings. In view of the administrative law judge's weighing of the medical opinion evidence, even if the administrative law judge erred in imposing a sanction against employer for its failure to comply with discovery, the error is harmless.[12] *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

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[12] Given the way in which this case evolved, it is not necessary for us to address employer's specific argument that the administrative law judge erred in granting claimant's motion to compel. Employer argues that the administrative law judge's Order to compel constituted reversible error because it was the basis for his determination to apply an adverse inference to employer's evidence and thereby unfairly prejudice employer in the presentation of its case. However, as discussed *supra*, the administrative law judge found employer's evidence outweighed on the merits. Therefore, the validity of the Order to Compel is moot.

Evidentiary Limitations:

Employer argues that the administrative law judge erred in allowing claimant to withdraw Dr. Lebovitz's report and to substitute Dr. Cohen's report as one of his two medical opinions proffered in support of his affirmative case. We disagree. Where an excess number of reports have been submitted and good cause is not established to exceed the evidentiary limitations, the administrative law judge has the authority to require a party to designate which medical reports are to be submitted in accordance with 20 C.F.R. § 725.414. *See Dempsey*, 23 BLR at 1-47. In the case at bar, claimant submitted three medical reports in support of his affirmative case. These included a November 9, 1995 report from Dr. Lebovitz, a December 3, 2003 report from Dr. Parker, and a July 15, 2003 report from Dr. Cohen. Since Section 725.414(a)(2)(i) permits claimant to submit only two affirmative medical reports in support of his affirmative case, the administrative law judge properly allowed claimant to withdraw Dr. Lebovitz's report.[13] *See* 20 C.F.R. § 725.414(a)(2)(i).

We further note that the obvious reason for employer to argue to retain Dr. Lebovitz's report was to support its argument that the subsequent claim was not timely filed. Because the administrative law judge addressed Dr. Lebovitz's report in relation to the timeliness issue, notwithstanding his ruling to strike the opinion, employer was

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[13] The district director had indicated that Dr. Lebovitz's report was not sufficiently reasoned to support claimant's burden of proof. Understandably, claimant would elect to rely on more recent medical opinions that had not been discredited.

not unduly prejudiced by the administrative law judge's ruling.

Merits of Entitlement

In addressing the merits of entitlement, the administrative law judge considered all of the medical opinions of record, which included the opinions of Drs. Jaworski, Devabhaktuni, Parker, Cohen, Renn and Rosenberg, He assigned greatest probative weight to the opinions of Drs. Parker and Cohen, who opined that claimant was totally disabled due to pneumoconiosis, and thus awarded benefits. On appeal, employer has not specifically challenged the weight accorded the opinions of it experts, Drs. Renn and Rosenberg, other than to state that the administrative law judge erred in assigning their opinions an adverse inference of bias.[14] *See*

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[14] The administrative law judge excluded supplemental reports prepared by Drs. Rosenberg and Renn, which were proffered by employer, and which expressed the physicians' disagreement with Dr. Parker that claimant is totally disabled due to pneumoconiosis. Employer argues that at least one of the physician's supplemental reports was arguably admissible as rebuttal evidence under the provision of 20 C.F.R. § 725.414(a)(3)(ii). However, we agree with the Director that the administrative law judge's error with respect to the exclusion of both reports was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Brief at 25, n.10. Neither physician's supplemental opinion addressed the deposition testimony of Dr. Parker, whose opinion was given controlling weight on the issues of entitlement based on his qualifications. Employer has not shown how admission of either supplemental opinion would alter the administrative law judge's credibility determinations, particularly since the supplemental opinions do little more than reiterate the original reports prepared by Drs. Renn and Rosenberg, which were properly considered by the administrative law judge. In sum, employer has not shown that it was prejudiced by the administrative law judge's ruling.

Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1993); *see also* Director's Brief at 26, n.10. With respect to claimant's medical experts, employer asserts that administrative law judge failed to explain the weight accorded Dr. Devabhakuni's opinion, and that he erred in crediting the opinions of Drs. Parker and Cohen relevant to disability causation.

Employer's arguments are without merit. Contrary to employer's assertion, the administrative law judge properly explained in his Decision and Order the weight he accorded Dr. Devabhaktuni's opinion on all of the relevant issues of entitlement. Employer's Brief at 50. In considering whether claimant established clinical pneumoconiosis, the administrative law judge noted: "I do not consider Dr. Devabhaktuni to have given an opinion favorable to [c]laimant because, on deposition, he stated that he would not have diagnosed simple coal workers' pneumoconiosis if the x-rays were negative." Decision and Order at 13. Since the administrative law judge found the preponderance of the x-ray evidence was negative for pneumoconiosis, the administrative law judge found that "Dr Devabhaktuni's testimony weighed against the presence of medical [coal workers' pneumoconiosis]." *Id.* The administrative law judge also found Dr. Devabhaktuni's opinion of little value in determining whether claimant was totally disabled since the physician testified that he could not determine whether claimant had the pulmonary capacity to perform his last coal mine job. Decision and Order at 16. Moreover, in considering whether claimant established the existence of legal pneumoconiosis and whether he established disability causation, the administrative law judge again found that Dr. Devabhaktuni's opinion was not deserving of probative weight. Decision and Order at 17. The administrative law judge noted that Dr. Devabhaktuni's opinion that claimant's

impairment was due to both coal dust exposure and smoking was too equivocal to carry claimant's burden of proof. *Id.* Consequently, although Dr. Devabhaktuni's opinion was supportive of claimant's case, the administrative law judge did not rely on it to award benefits, and employer has not demonstrated any error committed by the administrative law judge in his treatment of Dr. Devabhaktuni's opinion.

Likewise unsound, are employer's charges regarding Dr. Parker's opinion. We reject employer's assertion that Dr. Parker's opinion is flawed because he was unable to apportion the specific percentage of claimant's impairment due to smoking versus coal dust exposure. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir.1997); *Gross v. Dominion Coal Corp.*, 23 BLR 1- 8 (2003); *see generally Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); Employer's Brief at 52. Employer also suggests that Dr. Parker based his opinion on a positive x-ray and claimant's coal mine employment history, and therefore, that it is not a reasoned opinion to support the administrative law judge's finding of disability causation. Employer's Brief at 52. The record reflects, however, that the administrative law judge properly determined that Dr. Parker's opinion was reasoned and credible on the issue of disability causation because Dr. Parker based his opinion on claimant's symptoms, work and smoking histories, x-ray abnormalities, and the results of claimant's objective studies. *See Gross* 23 BLR at 1- 8; *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); Decision and Order at 17; Claimant's Exhibit 1. Moreover, in opining that claimant's impairment was due both to smoking and coal dust exposure, Dr. Parker accepted that the weight of the x-ray evidence presented in this case was negative for pneumoconiosis, which contradicted his own clinical finding that claimant had positive x-ray evidence for pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d

524, 21 BLR 2-323 (4th Cir. 1998); Claimant's Exhibit 1. Thus, the administrative law judge permissibly credited Dr. Parker's opinion at 20 C.F.R. § 718.204(c). *See Gross* 23 BLR at 1-8; Decision and Order at 17.

Lastly, employer argues that Dr. Cohen's disability causation opinion is of little value since the physician opined that claimant had clinical pneumoconiosis, and the administrative law judge found the medical evidence as a whole insufficient to establish that claimant has clinical pneumoconiosis. Employer's Brief at 53. Employer, however, fails to state that the administrative law judge explained his determination that Dr. Cohen also diagnosed legal pneumoconiosis. The administrative law judge specifically credited Dr. Cohen's opinion that claimant has legal pneumoconiosis based on his diagnosis that claimant's chronic obstructive pulmonary disease was due to smoking and coal dust exposure. Claimant's Exhibit 3; Decision and Order at 13. The administrative law judge reasonably credited Dr. Cohen's opinion that claimant is totally disabled by a moderate respiratory impairment, which is due in part to coal dust exposure, and thereby found Dr. Cohen's opinion sufficient to satisfy claimant's burden of proof at 20 C.F.R. § 718.204(c). Decision and Order at 15.

Consequently, because the administrative law judge explained the weight accorded all of the record evidence, took into consideration the qualifications of the physicians, and permissibly credited those physicians whose opinions he found to be well-reasoned and documented, *see Clark*, 12 BLR at 1-149, we affirm as supported by substantial evidence, the administrative law judge's finding that that claimant is totally disabled due to pneumoconiosis. We therefore affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

/s/

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I agree that the administrative law judge properly found claimant's subsequent claim to be timely filed since claimant did not receive a *reasoned* communication from a physician that he was totally disabled subsequent to the district director's January 11, 1996 denial of his prior claim. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). I also agree with my colleagues that the administrative law judge properly allowed claimant to withdraw Dr. Lebovitz's report as one of his two affirmative medical reports, substituting Dr. Cohen's opinion in its place. *See* 20 C.F.R. § 725.414(a)(2)(i).

However, I respectfully dissent from the majority opinion and their decision to affirm the administrative law judge's treatment of employer's medical experts. In my judgment, the administrative law judge's reference to Dr. Renn in the

context of the Black Lung Benefits Program, hearing transcript at 80-81, displayed preconceived bias, and tainted his consideration of all of the record evidence. When employer failed to comply with the motion to compel, rather than exercise his authority under the Rules of Practice and Procedure for Administrative Hearings before the Office of the Administrative Law Judges (OALJ) Rule 18.6(d)(2) and exclude consideration of the reports of Drs. Renn and Rosenberg, which authority he clearly recognized, the administrative law judge established a different standard for consideration of employer's evidence. In effect, he transferred his annoyance with employer's counsel to employer's evidence, and by so doing, failed to consider all evidence of record under the same standard. He portended to consider the opinions of Drs. Renn and. Rosenberg under a colored evaluation standard, on the one hand, while suggesting in fact that he had excluded their opinions from consideration.

The administrative law judge has an obligation to consider all evidence fairly. This he has not done. His predetermined evaluation of employer's evidence tainted his consideration of all evidence, which in my judgment violates the basic tenets of the Administrative Procedure Act, (APA), 5 U.S.C. § 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. § 554(c)(2), 33U.S.C. § 919(d) and 30 U.S.C. § 932(a), which requires a full and fair hearing on "all material issues of fact, law or discretion presented on the record."

Consequently, I would vacate the award of benefits and remand this case for reassignment to a different administrative law judge and a reweighing of the evidence on the merits of entitlement.

/s/

ROY P. SMITH
Administrative Appeals Judge

APPENDIX D

U.S. DEPARTMENT OF LABOR

Case No.: 2002-BLA-5329

[Filed June 1, 2004]

In the Matter of:	)
	)
BILLY D. WILLIAMS,	)
Claimant,	)
	)
v.	)
	)
CONSOLIDATION COAL COMPANY,	)
Employer,	)
	)
and	)
	)
DIRECTOR, OFFICE OF	)
WORKERS' COMPENSATION PROGRAMS,	)
Party-In-Interest.	)
	)

Before: FLETCHER E. CAMPBELL, JR. Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Billy Williams ("Claimant") for benefits under the Federal Coal

Mine Health and Safety Act ("the act") as amended, 30 U.S.C. 901 *et seq.*, against Consolidation Coal Company ("Employer"). Claimant seeks modification of a prior denial of benefits pursuant to 20 CFR 725.309(d). A formal hearing was held before me in this case in Morgantown, West Virginia, on September 11, 2003, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and regulations. At the hearing, I received into evidence all proffered exhibits: Claimant's exhibits (CX) 1-4; Employer's exhibits (EX) 1-10; and the Director's exhibits (DX) 1-45.[1] All were received into evidence subject to post-hearing motions to strike.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Has Claimant shown that he suffers from a coal-dust-related pulmonary disease?

2. If so, has Claimant shown that he is totally disabled at least in part as a result of his coal-dust-related pulmonary disease?

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[1] The following are citations to the record:
Tr. – Transcript of the hearing;
CX - Claimant's Exhibits;
EX – Employer's Exhibits; and
DX – Director's Exhibits.

STIPULATIONS

The parties have stipulated and I find that:

1. Claimant is an eligible coal miner.

2. Claimant worked in coal mines after 1969.

3. Claimant's wife, Wilma Williams, is an eligible dependent.

4. Employer is a properly named responsible operator.

5. Claimant worked at Consolidated Coal Company for 30 years and has at least 30 years of coal-mine employment.

(Tr. 106).

SUMMARY OF MEDICAL EVIDENCE

At the hearing, the parties submitted completed election forms in which they set forth the medical evidence on which they intended to rely pursuant to 20 CFR 725.414 (a). In the chart that appears below, I have summarized the evidence in the administrative record irrespective of any evidentiary limitations. Following this summary, I have set forth in chart form the parties' elections of evidence on which they intend to rely.

See Fold-Out Exhibits

I. Evidence of Record

II. Claimant's Election Form

III. Employer's Election Form

I. Evidence of Record

A. X-ray Evidence

Exhibit	Date of X-ray	Physician and Qualifications	Interpretation
DX 1	Unknown date in 1970's	Occupational Pneumoconiosis Board (OPB)	Occupational pneumoconiosis
DX 1, 12	10/26/82	OPB	Fine and coarse irregular fibrosis in a moderate amount, the result of an occupational pneumoconiosis
DX 34	12/6/88	OPB	Nodular fibrosis in a somewhat obvious amount, the result of an occupational pneumoconiosis
DX 34	9/28/95	Lebovitz	1/0 p/p
DX 34	9/28/95	Mathur (BCR, B)	1/0 p/s
DX 1	10/30/95	Jaworski (B)	0/1 q/q
DX 1	10/30/95	Gaziano (B)	Negative
DX 19	7/31/01	Hurst (BCR, B)	1/0 p/s. "Most likely not related to pneumoconiosis."
DX 20	7/31/01	Gaziano (B)	Read for quality only.
DX 33	7/31/01	Wiot (BCR, B)	Negative
DX 31	10/31/01	Renn (B)	Negative
DX 36; EX 1	10/31/01	Wheeler (BCR, B)	Negative
DX 36; EX 2	10/31/01	Scott (BCR, B)	Negative
EX 5	10/31/01	Rosenberg (B)	Negative
CX 1	12/3/02	Parker (B)	0/1 q/t
CX 3	7/15/03	Cohen (B)	1/0 q/t
EX 11	7/17/03	Wheeler (BCR, B)	Unreadable - digital image
EX 11	7/18/03	Wheeler (BCR, B)	Unreadable - digital image

"BCR" signifies board-certified radiologist
"B" signifies NIOSH-certified B-reader

B. Pulmonary Function Studies

Exhibit	Date	Physician	FVC	FEV1	FEV1/FVC	MVV
DX 32; EX 4	8/22/78	Charleston Area Medical Center	3.91	2.88		130

[age 53; height 70 1/4"; no statement of cooperation; no tracings]

DX 32; EX 4	12/5/88	St. Francis Hospital	Unreadable			101
DX 34	9/28/95	Lebovitz	3.0	2.25	75%	96.41

[age 70; height 70 inches; understood and cooperated; tracings]

BEST AVAILABLE COPY

DX 1	11/13/95	Jaworski (pre) (post)	3.14 3.34	2.20 2.38	70% 71%	90 96

[age 70; height 70 inches; good understanding and cooperation; tracings]

DX 17	7/31/01	Devabhaktuni (pre) (post)	2.66 2.65	1.77 1.80	66% 68%	74 77

[age 76; height 70.5 inches; good understanding and cooperation; tracings]
Dr. Gaziano says vents are acceptable.

DX 31	10/31/01	Renn (pre) (post)	2.69 2.58	1.78 1.86	66% 72%	84 78

[age 76; height 69 inches; good cooperation; tracings]

CX 1	12/3/02	Parker (pre) (post)	3.20 4.04	2.10 2.21	66% 55%	

[age 77; height 172.5 cm; good effort; tracings]

CX 3	7/15/03	Cohen (pre) (post)	3.09 3.14	1.98 2.03	64% 64%	91

[age 78; height 70 inches; very good comprehension and cooperation; tracings]
"pre" signifies before bronchodilator
"post" signifies after bronchodilator

C. Blood Gas Studies

Exhibit	Date	Physician	pCO2	pO2
DX 1	11/13/95	Jaworski (rest)	39	69
DX 16	7/31/01	Devabhaktuni (rest)	43	69
DX 31	10/31/01	Renn (rest)	44	63
CX 1	12/3/02	Parker (rest)	42.2	88.0
CX 3	7/15/03	Cohen (rest)	42.2	66.3

D. Medical Reports

Date	Exhibit	Physician	Comments
1978	DX 12	West Virginia Occupational Pneumoconiosis Board	CWP without impairment
10/30/95	DX 1	Jaworski	Mild COPD; Mild respiratory impairment, etiology: smoking, uncertain.
11/9/95	DX 34	Lebovitz	Permanently and totally disabled due to CWP
8/30/01	DX 15	Devabhaktuni	Diagnosis of COPD due to smoking and CWP due to occupational dust exposure. Moderate pulmonary impairment due to COPD.
11/11/01, 6/27/03	DX 31, EX 8	Renn	Chronic bronchitis; no pneumoconiosis; not disabled

9/26/02, 6/25/03	EX 5, 7	Rosenberg	No coal workers' pneumoconiosis.
1/22/03	CX 1	Parker	Diagnosis of chronic bronchitis, mild airflow obstruction and diffusion impairment. COPD results from smoking and occupational dust exposure. Disabled due to amputation and COPD.
8/18/03	CX 3	Cohen	Diagnosis of pneumoconiosis. Moderate obstructive impairment, diffusion impairment and mild hypoxemia are due to coal mine dust and tobacco smoke. Impairment is disabling.

II. Claimant's Election Form

A. X-Ray readings

EXHIBIT	PHYSICIAN	B/BCR	DATE OF STUDY	DATE OF READING	FILM QUAL.	READING
CX 1	Parker	B	12/3/02			0/1 q/t
CX 3	Cohen	B	7/15/03	7/23/03	2	1/0 q/t
DX 18	Hurst (OWCP evaluation)	BCR, B	7/31/01	8/16/01	1	1/0 p/s

"BCR" signifies board-certified radiologist
"B" signifies NIOSH-certified B-reader

B. Pulmonary function study (PFS)

Exhibit	Physician	Date of Study	Tracings Present?	Flow-Volume Loop?	Broncho-Dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
CX 1	Parker	12/3/02	Yes	Yes	Yes pre post	2.10 2.21	3.20 4.04	Good
CX 3	Cohen	7/15/03	Yes	Yes	Yes pre post	1.96 2.03	3.09/99 3.14	Very good
DX	Devabhaktuni (OWCP evaluation)	7/31/01	Yes	Yes	Yes pre post	1.77 1.80	2.66/74 2.65/77	good

C. Arterial Blood Gas Studies

Exhibit	Doctor	Date of Study	Altitude	Resting/ Exercise	PCO2	PO2	Comments
CX 1	Parker	12/3/02	0-2999	Resting	42.4	88.0	Normal
CX 3	Cohen	7/15/03	0-2999	Resting	42.4	66.3	Mild hypoxemia
DX 16	Devabhaktuni (OWCP evaluation)	3/31/01	0-2999	Resting	43	69	Unable to exercise

D. Medical Reports

Exhibit	Exam Date	Examining Physician	Comments
CX 1	1/22/03	Parker	Diagnosis of chronic bronchitis, mild airflow obstruction and diffusion impairment. COPD results from smoking and occupational dust exposure. Disabled due to amputation and COPD.
CX 3	8/18/03	Cohen	Diagnosis of pneumoconiosis. Moderate obstructive impairment, diffusion impairment and mild hypoxemia are due to coal mine dust and tobacco smoke. Impairment is disabling.
DX 15	8/30/01	Devabhaktuni (OWCP evaluation)	Diagnosis of COPD due to smoking and CWP due to occupational dust exposure. Moderate pulmonary impairment due to COPD.

III. Employer's Election Form

A. X-Ray readings

EXHIBIT	PHYSICIAN	B/BCR	DATE OF STUDY	DATE OF READING	FILM QUAL.	READING
DX 36	Scott	B/BCR	10/31/01	11/26/01	1	Negative
DX 36	Wheeler	B/BCR	10/31/01	11/21/01	1	No CWP
DX 33	Wiot (Rebuttal)	B/BCR	7/31/01	11/29/01	1	No pneumoconiosis
DX 31	Renn (Rebuttal)	B	7/31/01	11/10/01	1	No pneumoconiosis

"BCR" signifies board-certified radiologist
"B" signifies NIOSH-certified B-reader

B. Pulmonary function study (PFS)

Exhibit	Physician	Date of Study	Tracings Present?	Flow-Volume Loop?	Broncho-Dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 31	Renn	10/31/01	X	X	X	1.78		Yes

C. Arterial Blood Gas Studies

Exhibit	Doctor	Date of Study	Altitude	Resting/ Exercise	PCO2	PO2	Comments
DX 31	Renn	10/31/01	<2500	Resting	44	63	

D. Medical Reports

Exhibit	Exam Date	Examining Physician	Comments
DX 31, Ex 8	11/11/01 06/27/03	Renn	Chronic bronchitis; no pheumoconiosis; not disabled
EX 5,7	9/26/02 6/25/03	Rosenberg	No coal workers' pneumoconiosis

BACKGROUND

Mr. Williams' first claim for black lung benefits, filed on July 27, 1995, was denied by the Department of Labor on January 11, 1996 (DX 1).[2] Claimant filed his second claim (the present claim) on June 6, 2001 (DX 3).

Two months prior to the 2003 hearing, Claimant's counsel served a set of fourteen interrogatories and requests for production of documents on Employer. This discovery concerned Employer's relationship with two of its expert physicians, Drs. Renn and Rosenberg. Employer refused to respond to most of the interrogatories.

At the hearing, following argument, I admitted all proffered documentary exhibits subject to a post hearing motion to strike (Tr. 93-6). Also at the hearing, Employer requested permission to rebut the report of Dr. Robert Cohen (CX 3) which, over objection, I granted (Tr. 100-4).

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[2] This claim was based on the now much criticized reading of an October 30, 1995 X-ray by Dr. Lebovitz (DX 34).

In addition, Claimant moved to compel discovery, a motion that I granted concerning interrogatories 5 through 14 (Tr. 74-90). However, in view of the fact that the identical issue was being litigated in *Fred Wood v. Elkay Mining Co.*, 2001-BLA- 0701, then pending before the Benefits Review Board, I granted Employer's motion to stay discovery until the Board ruled in the *Wood* case (Tr. 91-2).

Following Mr. Williams' testimony at the hearing, Employer moved for summary decision based upon the contention that the claim was not timely filed pursuant to 20 CFR 725.308. Based on the argument of counsel, I denied the motion. On March 23, 2004, Employer renewed its motion for summary judgment, which motion I again denied.

Following the hearing, on October 14, 2003, pursuant to my prior order, Claimant filed a motion to strike certain evidence, to which motion Employer did not respond. I will rule on this motion herein below.

On December 9, 2003, following the Benefits Review Board's decision not to review my order in *Wood v. Elkay Mining Co.*, I issued an order compelling discovery in this case. However, Employer sought interlocutory review by the Board of my order compelling discovery. On February 24, 2004, the Board dismissed Employer's appeal. Therefore, on March 2, 2004, I issued a second order compelling discovery. On March 23, 2004, Employer petitioned the Board for reconsideration and rehearing *en banc* and an order staying the proceedings before me. On April 14, 2004, the Board issued an order on reconsideration *en banc* in which it again denied Employer's motion to accept an interlocutory appeal of the discovery order.

By letter of April 1, 2004, Employer stated its refusal to comply with the discovery order. In light of this and in light of the fact that it has also taken a position in *Wood* that it does not intend to comply with a similar discovery order, I deem Employer's decision not to comply with discovery requests to be an unconditional and final decision.

SUMMARY OF HEARING TESTIMONY

Billy Williams, who is 78 years old, married his wife, Wilma Williams, on February 28, 1948 (DX 1, 3, 14; Tr. 26, 68). Employer has stipulated to the dependent status of Mrs. Williams (Tr. 106).

Mr. Williams testified that he worked in coal mine employment at one mine or another, including shaft construction, for a total of 38 years (Tr. 27). The UMWA Health and Retirement Funds have credited Claimant with 38 years of coal-mine employment between 1950 and 1987 (DX 9; Tr. 27). Employer has stipulated to at least 30 years of coal-mine work from 1958 through 1987 (Tr. 106). I so find.

Claimant testified that his first coal-mine employment was for Williamson Shaft Company from 1950 to 1956 (Tr. 27-9). His work for Williamson Shaft was to sing air shafts and production shafts for coal companies (Tr. 27-8). He worked as a drill runner inside the shaft and then as a hoist engineer (Tr. 29-31). He testified that the Social Security earnings record was incorrect in stating that he worked for Eidetics Aircraft form 1950 to 1956 (DX 10; Tr. 31-2). He also testified that the Social Security earnings record listed earnings from Jamison Coal and Coke in the years 1951-1953 because in those years he was working for Williamson Shaft at mines owned by Jamison Coal and Coke and was being paid by Jamison Coal and Coke (DX 10; Tr. 32). After

leaving Williamson Shaft in 1956, he worked for R.G. Johnson rebuilding a shaft in a coal mine (Tr. 32-3). After working for R.G. Johnson, Mr. Williams went to work for Consolidation Coal Company, where he worked from 1957 through 1987 (Tr. 33). At first he was considered a general outside laborer, but, after the preparation plant at the Loveridge Mine was completed, he worked in the preparation plant as a mechanic and welder (Tr. 33-4). After 25 years in the preparation plant, he went to the outside shop and worked there for about six years until 1987 (Tr. 35).

In his six years in the outside shop, Claimant worked as a welder and mechanic (Tr. 35). This job required heavy strenuous work at times (Tr. 35). Claimant carried mine car wheels weighing 140 to 150 pounds; electric motors, which weighed from 25 to 500 pounds; acetylene gas and air tanks, which weighed about 250 pounds; miner bits, which weighed 80 to 100 pounds; welding rods, which weighed 50 pounds; buckets of oil and grease, which weighed 60 pounds; 25 gallon drums; and a tool box, which weighed 90 to 100 pounds (Tr. 36-7, 49-50). He had to do continuous lifting and - 9 - carrying of heavy objects when he was loading supplies to go into the mine (Tr. 37-8). During about three days a week, he spent two to three hours a day lifting and carrying heavy objects while loading supplies (Tr. 38, 51-3). In loading supplies, Claimant had to carry objects weighing 75 pounds or more a distance of from 40 to 60 feet (Tr. 38, 53). He explained that the crane which he had mentioned to Dr. Renn was in only half of the building and did not extend to the back of the shop where they kept motors, oil, grease, acetylene and oxygen tanks, rods and miner bits (Tr. 39, 50).

Claimant retired at age 62 because of shortness of breath (Tr. 39). He understood at the time that he retired that he would be receiving a reduced amount of Social Security

because he was not yet 65 (Tr. 40). Since his retirement, he has done some work as an errand boy for relatives. In this work he has not lifted over 40 or 50 pounds and has averaged only three days of work a week (Tr. 40).

Mr. Williams first noticed that he was short of breath back in the 1980s (Tr. 41). He smoked cigarettes for 43 or 44 years until 1987 (Tr. 42). He smoked about a half pack a day when he was working and a pack a day on weekends (Tr. 42, 47-8). He now gets short of breath when walking up an incline or climbing steps, and he has only limited ability to lift and carry objects (Tr. 42-3). His breathing was worse in 2001 than it had been in 1996, when he first filed a black-lung claim (Tr. 45). Now he is not able to do the heavy lifting and carrying that was required in his last job as a coal miner (Tr. 43, 55).

Claimant was examined by Dr. Jerome Lebovitz in Pittsburgh, and he received a copy of Dr. Lebovitz's report in a letter to him from his previous counsel, Anthony Kovach, dated December 6, 1995 (Tr. 43). The Department of Labor denied his first black lung claim on January 11, 1996, about a month after he received the report of Dr. Lebovitz from Mr. Kovach (Tr. 43-4). Claimant understood that Dr. Lebovitz diagnosed him as totally disabled due to pneumoconiosis (Tr. 46-7). However, after receiving the denial from the Department of Labor, he did not think that there was any need to carry his case further (Tr. 44). Mr. Williams testified that he refiled his claim in 2001 because his breathing had become worse (Tr. 45).

Witness Ronnie Moore testified that he worked with Claimant at Williamson Shaft for about two and a half years around 1952 and 1953 (Tr. 61).

Witness James Constable testified that he worked with Claimant at the Loveridge Mine as a mechanic and welder (Tr. 63-4). Mr. Constable testified that he and Claimant performed very strenuous work, which required lifting and carrying heavy objects on a continuous basis for two or three hours at a time for three days a week (Tr. 64-6). The heavy objects included motors, air tanks, buckets of oil and grease, boxes of miner bits and welding rods (*Id.*).

PRELIMINARY MATTERS

A. Claimant's Motion to Strike I

In his motion to strike submitted on September 29, 2003, Claimant moved to strike the report of Dr. Lebovitz (DX 34), Dr. Scott's reading of the October 31, 2001 X- ray (EX 2 and DX 36), Dr. Rosenberg's interpretation of the same X-ray (EX 5), Dr. Rosenberg's consultation report and curriculum vitae (EX 5, 6), and the reports of Drs. Renn and Rosenberg of June 2003 (EX 7, 8). I will consider each motion in turn.

1. Claimant complains that Dr. Lebovitz's report and test are unreliable to the point of being "worthless." I find that Dr. Lebovitz's report is relevant and probative and that Claimant's objection goes to the weight to be accorded it rather than its admissibility. However, because neither side has chosen to rely on the report, it should be stricken pursuant to 20 CFR 725.414. Therefore, I grant the motion to strike it.

2. Claimant argues that Dr. Scott's reading of the October 31, 2001 X-ray (DX 36, EX 2) exceeds the two-X-ray interpretations limit set forth in 20 CFR 725.414(a)(3)(i). I agree, but, in light of the fact that I am devaluing Dr. Renn's opinion because of Employer's refusal

to comply with discovery orders, I will allow Employer to substitute Dr. Scott's interpretation for that of Dr. Renn. Therefore, this motion is denied.

3. Claimant moves to strike Dr. Rosenberg's interpretation of the October 31, 2000 X-ray (EX 5) on the same grounds as that advanced for striking Dr. Scott's interpretation. Because Dr. Rosenberg's interpretation, if admitted into evidence, would indeed exceed the evidentiary limitations contained in 20 CFR 725.414(a)(3)(i), I must and do strike this evidence.

4. Claimant objects to Dr. Rosenberg's consultation report and curriculum vitae (EX 5, 6) because the report relies on chest X-ray interpretations which are inadmissible. At pages four and five of his report, Dr. Rosenberg stated that he relied on the interpretations of Drs. Renn, Wheeler, Scott, and Wiot as well as his own interpretation of the X-ray. Although I cannot determine with certainty whether Dr. Rosenberg would have reached the same conclusion that he did if he had relied only on admissible X-ray interpretations, I will not strike his report. Because I find herein (and Claimant acknowledges) that a significant preponderance of X-ray evidence is negative for medical CWP, I find it highly unlikely that Dr. Rosenberg's mind would have changed if he had not considered one or two negative X-ray reports. Therefore, I decline to strike EX 5, nor will I strike EX 6, Dr. Rosenberg's *curriculum vitae*.

5. Claimant moves to strike the reports of Drs. Rosenberg and Renn (EX 7, 8), which were offered as "subsequent supplemental opinions addressing the report of Dr. Parker." At the hearing, I stated that these reports were admissible (Tr. 102-3). Upon reconsideration, I agree with Claimant that 20 CFR 725.414(a)(3)(ii) does not permit

rebuttal of a medical report offered by an opposing party. That being the case, I reverse my ruling and grant Claimant's motion to exclude EX 7 and EX 8.[3]

B. Reassignment or Remand of Case

On brief, Employer argues that I should either reassign or remand the case to the District Director. The reason for this motion is obscure and boils down to the argument that Employer strongly disagrees with my rulings in this case. Employer does not argue that a new hearing or a remand would result in the development of new evidence.

Employer takes issue with some of my findings in the order compelling discovery. For example, Employer disagrees with my citation to the Federal Rules of Civil Procedure but ignores the fact that I cited them only by analogy and not because they are controlling. In addition, where I took official notice, Employer has not sought to adduce any contrary evidence despite the fact that I issued the order more than five months ago. For example, if Dr. Renn has in fact testified for claimants in black lung hearings, this would have been easy to prove. However, I have received no offer of proof of Dr. Renn's testifying in favor of a claimant in a black lung hearing before the Department of Labor.

Employer objects to my statement at the hearing that Dr. Renn "very well might be" a hack. The truth or falsity of this could be determined by Employer's compliance with my discovery order. However, I decline to impose a requirement

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[3] At the hearing, I gave Employer permission to submit a response from one physician to Dr. Cohen's X-ray reading report (Tr. 104), but I have not received any such response.

that Claimant make a showing of bias or prejudice before he may seek discovery concerning such bias. *United States v. International Business Machines Corp.*, 66 FRD 215 (S.D.N.Y. 1974). To impose such a requirement would be to compel a party to prove something before he could obtain discovery on the subject. This would defeat the purpose of discovery and create a hopelessly circular discovery scheme.

For all of these reasons, I decline Employer's invitation to remand or transfer this case.[4]

C. Employer's Motion to Dismiss for Failure to File a Timely Claim

For the third time, Employer raises the timeliness issue. Both at the hearing (Tr. 59) and by order of April 16, 2004, I have denied Employer's motion for summary judgment based on failure to satisfy the statute of limitations in 30 USC

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[4] Employer also complains about my delay in ruling on Claimant's motion to strike. However, Employer has not argued, much less shown, how this has prejudiced Employer. I will amend one of my findings made in the order of December 9, 2003 compelling discovery. In that order, in paragraph 9, I found that "Claimant's discovery requests are burdensome but not unduly so for a firm like Jackson Kelly." In light of Employer's failure to provide some evidentiary basis for its contention that responses to the interrogatories would be in any way burdensome, I now believe that my finding that response to these requests would be burdensome was unjustified. *See Resolution Trust Corp. v. World Wide Insurance Management Corp.*, 147 FRD 125, 127 (N.D. Tex. 1992), aff'd 992 F. 2d 235 (5th Cir. 1992). In re *Mulhern*, 45 BR 621, 623 (E.D. Pa. 1985). Until Employer makes a showing or an offer of proof regarding the burdensomeness of these interrogatories, no such finding would be justified.

932 (f) and 20 CFR 725.308. For the reasons stated in the April 16, 2004 order, I again decline to deny or dismiss Mr. Williams' claim on this basis.

D. Sanctions

Because Employer has willfully refused to comply with my discovery orders, I must determine what sanctions to impose. Claimant requests that I strike all opinion statements and testimony of Drs. Renn and Rosenberg. I am satisfied that I have the authority to do so under 29 CFR 18.6(d)(2)(ii), (iii) and 29 CFR 18.29(a)(9). However, I have determined not to go quite that far. Instead, I will treat the opinion statements of these two witness as if Employer had complied with discovery and as if its responses to that discovery had demonstrated significant bias by both witnesses toward employers as a class and Jackson and Kelly clients as a class. Thus, I will admit into evidence the statements of Drs. Renn and Rosenberg (except EX 7 and 8) but credit their opinions only when they are a) uncontradicted, b) contradicted only by a significantly less well qualified expert or c) significantly better reasoned. This is the least Draconian sanction that I could impose and still effectively enforce my discovery orders. As a practical matter, this will sometimes have the same effect as a striking of all of the evidence in question.

THE MERITS OF THE CASE

A. Modification

The regulations, 20 CFR 725.309(d), provide that, where a miner's earlier claim has been denied, a later claim must also be denied on the grounds of the prior denial unless there has been a "change in conditions." In order to demonstrate a change in conditions, a claimant must, using all of the

pertinent medical evidence of his condition adduced after the prior denial (in this case September 15, 1993), prove at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996). In 1996, the District Director denied Mr. Williams' claim on the grounds that he did not demonstrate the presence of coal workers pneumoconiosis (CWP) or a totally disabling respiratory disease (DX 1). Therefore, Claimant can demonstrate a change of condition by establishing either of these things.

B. Pneumoconiosis

To secure benefits, Claimant must first establish that he has a coal-dust-related pulmonary disease. 20 CFR 718.201. Such a disease may consist of "medical" pneumoconiosis or a disease that falls under the definition of "legal" pneumoconiosis, such as emphysema, chronic obstructive pulmonary disease (COPD), chronic bronchitis, etc. (*Id.*). Claimant can make his case by use of X-rays or by reasoned medical opinions or both (*Id.*).

Here, Claimant does not argue that X-ray evidence establishes that he has medical CWP (brief at 38). Although Dr. Cohen interpreted one X-ray as positive for CWP (CX 3), the record contains negative interpretations by Drs. Jaworski, Gaziano, Wiot, Wheeler, and Parker (DX 1, 33, 36; EX 1; CX 1). Even if Dr. Renn's interpretation of October 31, 2001 is stricken or devalued, the record would still include the negative interpretation by Dr. Scott (DX 36, EX 2). Although Dr. Hurst interpreted the July 31, 2001 X-ray as 1/0, she stated that the changes observed were "most likely not related to pneumoconiosis" (DX 19). Hence, as Claimant admits, the preponderance of chest X- ray interpretations is negative for medical CWP.

Under 20 CFR 718.202(a)(4), the presence of CWP can be proven by reasoned medical opinions. As to medical opinion evidence, the following persons or entities diagnosed CWP: the West Virginia Occupational Pneumoconiosis Board (DX 1, 12, 34); Dr. Devabhaktuni (DX 15); Dr. Parker (CX 1); and Dr. Cohen (CX 3). The following did not diagnose CWP: Dr. Jaworski (DX 1); Dr. Renn (DX 31); and Dr. Rosenberg (EX 5). I will consider each in turn.

1. I do not consider Dr. Devabhaktuni to have given an opinion favorable to Claimant because, on deposition, he stated that he would not have diagnosed simple coal workers' pneumoconiosis if the X-rays were negative (DX 35 at 11). As I have found that a preponderance of the X-ray evidence is negative, I must find that Dr. Devabhaktuni's testimony weighs against the presence of medical CWP.

2. In 1978, the West Virginia Occupational Pneumoconiosis Board ("WVOPB") issued an opinion in which it stated that Claimant had "CWP without impairment" (DX 12). This opinion is unreasoned and very old. Therefore, I do not credit it.

3. I discount Dr. Jaworski's opinion because it is relatively old (1995) and poorly reasoned (DX 1).[5]

4. I do credit the opinion of Dr. Parker, who did diagnose legal CWP (CX 1 at 3), because of his superior qualifications and reasoning. Dr. Parker is a professor of

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[5] Dr. Jaworski's diagnosis of "mild COPD" (DX 1) is not inconsistent with a diagnosis of legal CWP. 20 CFR 718.201. An old opinion about a progressive disease like CWP is without much value.

medicine at West Virginia University Medical School, a former head of the NIOSH B- reader program, the co-author of a medical text on occupational lung disease and a board-certified pulmonary physician who is also a certified B-reader (CX 2, EX 9 at 5-6, 53-7). His opinion statement is well reasoned and documented. He considered the literature in the field, and his views are consistent with current scientific opinion (CX 1).

5. Likewise, Dr. Cohen, who also diagnosed legal CWP (CX 3), is a well qualified board-certified pulmonary physician who is also a B-reader. He is a senior attending physician in the field of pulmonary medicine at Cook County Hospital in Chicago as well as a professor of medicine at the University of Illinois School of Medicine. He has to his credit some 30 publications, some of them concerning occupational respiratory diseases (CX 4). In addition, Dr. Cohen's opinion is well reasoned and is informed by the medical literature in the field.

Opining to the contrary were Drs. Renn and Rosenberg, whose opinions I do not credit. I must devalue these opinions on credibility grounds on the key issue of the presence of legal CWP because 1) they are contradicted by as well or better qualified experts; 2) their reasoning is not superior to that of Dr. Parker or Dr. Cohen; and 3) they do not exhibit a knowledge of or accord with current medical and scientific thinking on the issue of coal-dust causation of pulmonary disease.

For example, Dr. Rosenberg attempted to explain his ruling out of causation by coal dust by stating that medical literature does not show that coal-dust exposure, unlike cigarette smoking, can cause a decrease in FEV1 percent (FEV/FVC), which is the type of ventillatory impairment that

Claimant has. However, the Department of Labor in its preamble to the new black-lung regulations has stated the exact opposite. See 65 FR 79920, 79943 (Dec. 20, 2000), citing a NIOSH publication entitled *Criteria for a Recommended Standard, Occupation Exposure to Respirable Coal Mine Dust* (1995).

Because of superior qualifications of Dr. Parker, I would credit his opinion and the opinion of Dr. Cohen over those of Drs. Renn and Rosenberg even if I had not devalued the latter two on the basis of Employer's failure to respond to discovery. However, my ruling on the discovery issue makes me even more certain that Drs. Parker and Cohen should be credited over all other witnesses on the issue of CWP.

The Court of Appeals for the Fourth Circuit in *Island Creek Coal Company v. Compton*, 211 F. 3d 203 (4th Cir. 2000) held that, after the evidence as to the existence of pneumoconiosis is weighed within each subcategory, it must be weighed as a whole. In this case, the existence of CWP was not established by chest X-rays under subsection (a)(1), but it was established by medical opinion evidence under subsection (a)(4). However, a *Compton* analysis is unnecessary because of the distinction between "legal" and "medical" CWP. That is, the X-ray evidence and medical opinion evidence are not in conflict. The X-ray evidence does not support a finding of medical CWP, and the medical opinion evidence as a whole does not either. Likewise, the X-ray evidence does not tend to rule out legal CWP, which, according to my finding, the medical opinion evidence preponderantly establishes.

In conclusion, I find that Claimant has shown by a preponderance of evidence that he has legal CWP.

C. CAUSATION

The regulations provide that there is a rebuttable presumption that Claimant's CWP is due to coal-mine employment if the claimant has ten years or more of coal mine employment. 20 CFR 718.203(b). Here, the parties have stipulated, and I find, that Claimant has at least 30 years of coal mine employment (Tr. 106). Thus, the presumption that Claimant's CWP arose from his coal mine employment is invoked. For the reasons stated above, I credit Drs. Parker and Cohen over the naysaying opiners. Therefore, I find that the presumption is not rebutted and that Claimant has proved that his CWP arose at least in part out of his coal-mine employment.

However, Claimant has proven causation without benefit of the presumption. Dr. Parker opined by letter as follows:

> "The combined lung injury from work-place dust, such as dusts present in the coal-mine environment, as well as tobacco smoke, clearly both contribute to the development of chronic obstructive pulmonary disease. . . It is my opinion that Mr. Billy D. Williams has chronic obstructive pulmonary disease and bronchitis as a result of both his inhaled tobacco smoke as well as his exposure to work- place dust."

(CX 1 at 3).

In addition, no witness stated that, if Claimant had legal CWP, it did not arise from coal-dust exposure that occurred in the course of his coal-mine work. In light of Dr. Parker's testimony, Claimant's stipulated 30 years of work-place coal dust exposure (Tr. 106) and the total absence of evidence

suggesting an alternative source, I find that Claimant has also proven causation of legal CWP by coal-mine dust exposure.

D. TOTAL DISABILITY

Total disability is defined as the inability of a miner to perform his last coal-mine job and any comparable gainful employment in his area. 20 CFR 718.204(b)(1). Under section 718.204(b)(2), Claimant can prove total disability by adducing evidence of qualifying results from pulmonary function or blood gas studies. Claimant acknowledges that he cannot show total disability via these routes (brief at 46). I agree. However, he contends that he has demonstrated that he is totally disabled through the reasoned medical opinions of Drs. Parker and Cohen pursuant to section 718.204(b)(2)(iv). In making a determination as to whether or not Claimant is totally disabled, I must consider the requirements of his usual coal-mine work. In this case, Claimant's last six years as a welder and mechanic in the outside shop constituted his usual coal-mine work (Tr. 35-8). In that job, Claimant had to load supplies about three days a week. In doing so, he had to lift objects which weighed over 100 pounds, and he had to carry objects weighing 75 pounds or more a distance of 40-60 feet (Tr. 50-3, 64- 6). When he loaded supplies, the heavy lifting and carrying took two to three hours (Tr. 38, 51, 53, 66). If Claimant is found not to be able to do this kind of work, he must be found totally disabled from a pulmonary standpoint.

Dr. Parker and Dr. Cohen both opined that Claimant is unable to perform his usual coal mine work as an outside shop mechanic because of his pulmonary impairment. Dr. Parker stated that Claimant is so disabled because of his amputation and chronic airflow obstruction (CX 1). On deposition, Dr. Parker stated that Claimant's breathing impairment alone

would disable him (EX 9 at 57). Dr. Parker is familiar with the work of a shop mechanic in coal mining from visiting mining operations and from talking to coal miners and industrial hygienists at NIOSH (*Id.*). Dr. Parker's opinion was well reasoned. He stated that Claimant could not perform this work because, with an FEV1/FVC ratio of 55, Claimant would experience air trapping and stacking of breaths and dyspnea which would prevent his continued performance of this heavy labor (EX 9 at 29-30, 63-4). Also, with a diffusing capacity of 54% of predicted, Claimant would desaturate with exercise. This would also prevent him from performing prolonged heavy labor (EX 9 at 60).

Dr. Cohen likewise stated that Claimant could not perform his previous job in the coal mines (CX 3 at 2). He noted that Claimant was required to stand for 7 1/2 hours per day and lift objects between 80 and 100 pounds every two hours o so, carrying those objects 60-80 feet (*Id.*). With moderate obstructive lung disease and moderate impairment in diffusing capacity, a person would be unable to perform this kind of work (CX 3 at 13).

I credit the opinions of Drs. Cohen and Parker over other opining witnesses (Drs. Jaworski, Devabhaktuni, Renn and Rosenberg) because: 1) Dr. Jaworski's opinion (DX 1) that Claimant is not totally disabled is old (1995), and Claimant's obstructive lung disease has worsened since then. Dr. Jaworski noted that Claimant's obstructive impairment was only mild in 1995 (DX 1). 2) On deposition, Dr. Devabhaktuni testified that he could not determine whether Claimant had the pulmonary capacity to perform his last coal-mine job (DX 35 at 16-17). Also, Dr. Devabhaktuni seemed to have been testifying in terms of total disability for purposes of Social Security benefits entitlement (*Id.*). 3) The opinions of Drs. Renn and Rosenberg cannot be credited

because they are contradicted by as well or better qualified experts and their opinions are not well reasoned because their understanding of the duties of Mr. Williams' last job was incorrect.

Dr. Renn based his opinion on the belief that Claimant did not have to perform heavy lifting because there was an overhead crane in the shop (DX 31 at 1). However, Mr. Williams testified that the crane was in only half the building and did not extend to the back of the shop where the company kept motors, oil and grease, acetylene and oxygen tanks, rods and miner bits (Tr. 39, 50). James Constable, a co-worker of Claimant's who testified at the hearing, corroborated Claimant's testimony that he had to perform very strenuous work which required lifting and carrying of heavy objects on a continuous basis for two to three hours at a time (Tr. 64-6). As the testimony of Mr. Williams and Mr. Constable was not contradicted by anyone who witnessed Mr. Williams' work, I find that Dr. Renn's understanding of the nature of Claimant's work as a shop mechanic was flawed, and, as a result, his testimony cannot be credited.

Likewise, it is unclear whether Dr. Rosenberg understood what Claimant's last job as an outside mechanic entailed. In opining that Claimant's near normal MVV meant that he could do his last job (EX 5 at 6), it is unclear whether he accepted Dr. Renn's opinion that there was no heavy lifting or whether he accepted Dr. Cohen's opinion that heavy lifting was required. Because it has not been shown that Dr. Rosenberg knew Claimant's actual job duties, I cannot credit his opinion. *Walker v. Director, OWCP*, 927 F. 2d 181 (4th Cir. 1991).

Thus, on their merits alone, I find that the opinions of Drs. Cohen and Parker should be credited over those of Drs.

Renn and Rosenberg. In light of my decision to discredit the opinions of Drs. Renn and Rosenberg because of Employer's failure to comply with discovery orders, my crediting of Drs. Parker and Cohen is even more emphatic.

E. CAUSATION OF TOTAL DISABILITY

Claimant must establish that his CWP is a substantially contributing cause of his totally disabling pulmonary impairment. 20 CFR 718.204(c). In this case, Claimant contends that his CWP has a material adverse effect on his pulmonary condition within the meaning of section 718.204(c). Claimant argues and I find that the opinions of Drs. Parker and Cohen establish that Claimant's coal-dust exposure contributes to his moderate obstructive impairment, which impairment totally disables him because of the rigors of his last coal-mine job.

I credit Drs. Parker and Cohen over Drs. Jaworski, Renn and Rosenberg because all of the last three concluded that Claimant did not have CWP. An opinion of a physician who wrongly states that a claimant does not have a disease is entitled to little weight on the issue of disability causation. *Scott v. Mason Coal Co.*, 289 F 3d 263 (4th Cir. 2002). In this case, the opinions of Drs. Jaworski, Renn and Rosenberg that Claimant does not have CWP contradict my finding that Claimant has legal CWP. Therefore, their opinions are entitled to no weight. Of course, the opinions of Drs. Renn and Rosenberg would be entitled to no weight anyhow under my sanction as their opinions are contradicted by equally well or better-qualified experts.

I also credit the opinions of Drs. Parker and Cohen over that of Dr. Devabhaktuni because Dr. Devabhaktuni's qualifications are less impressive than those of Drs. Parker

and Cohen and because Dr. Devabhaktuni's opinion on causation of CWP was equivocal (compare DX 15 with DX 35 at 14-15).

As a result of the above, I find that Claimant has sustained his burden of proof on the issue of causation of total disability and on all other elements of proof.[6] *A fortiori*, he has established more than one element of entitlement previously decided against him and is, thus, entitled to modification pursuant to 20 CFR 725.309. Also as a result, I will award him benefits as requested.

ORDER

It is hereby ORDERED as follows:

1. Claimant's motion for modification is GRANTED.

2. Employer shall pay Billy D. Williams all benefits under the act to which he is entitled commencing June 6, 2001.

3. Within twenty days of receipt of this order, Claimant's representative shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who shall have ten days to respond with objections thereto.

/s/
FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

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[6] The result and my principal findings in this case would be the same without the devaluation of the opinions of Drs. Renn and Rosenberg because of Employer's failure to make discovery.

(3)

No. 06-806

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In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

BILLY D. WILLIAMS, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals and the Director of the Labor Department's Office of Workers' Compensation Programs properly interpreted the statute of limitations to permit a black lung claimant to file a claim more than three years after a misdiagnosis of total disability due to pneumoconiosis which had been legally nullified by the Department's determination that the miner was not, at that earlier time, entitled to an award of black lung benefits.

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65 Fed. Reg. at 79968 10

STATEMENT OF THE CASE

Respondent Billy D. Williams worked in coal mine employment in West Virginia for 38 years. In July 1995, after retiring, he filed his first claim for black lung benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 et seq. ("the Act"). While the claim was pending, Mr. Williams was examined by Dr. Jerome Lebovitz, who wrote a report concluding that Mr. Williams was totally disabled due to pneumoconiosis. On January 11, 1996, about a month after Mr. Williams received the report from Dr. Lebovitz, the Department of Labor denied his claim for black lung benefits. The Department of Labor notified Mr. Williams that he did not have pneumoconiosis and that he was not totally disabled by the disease. Believing that there was nothing more he could do, Mr. Williams did not appeal. Pet. App. 65a.

By 2001 Mr. Williams' breathing had become worse, and so he filed a second claim for black lung benefits on June 6, 2001. Pet. App. 5a. On this second claim, after having Mr. Williams examined by a physician, the Department of Labor concluded that he was totally disabled due to pneumoconiosis. Petitioner Consolidation Coal Company appealed the decision and argued both that Mr. Williams was not totally disabled due to pneumoconiosis and that his claim was time-barred because of the receipt of Dr. Lebovitz's report six years earlier.

While the case was pending before the Labor Department's Office of Administrative Law Judges, both sides developed medical evidence to support their positions. At the hearing, Mr. Williams moved to strike the report of Dr. Lebovitz from evidence because it was very poorly prepared and substitute in its place a more probative medical report

from Dr. Cohen. Pet. App. 25a-26a, 50a, 66a. On June 1, 2004, Administrative Law Judge Fletcher E. Campbell, Jr. issued a Decision and Order finding Mr. Williams entitled to an award of black lung benefits. Pet. App. 57a-80a. The ALJ reiterated the rulings he had made both at the hearing and in a written order denying Consolidation Coal's renewed motion for summary judgment on April 16, 2004, and again found that Mr. Williams' claim was timely filed. Pet. App. 69a-70a.

Consolidation Coal appealed Judge Campbell's Decision and Order to the Benefits Review Board, which issued a Decision and Order on August 8, 2005 affirming the award of black lung benefits. Pet. App. 30a-55a. The Board unanimously agreed with the ALJ's conclusion that the claim was timely filed. Pet. App. 40a-41a.[1]

The Court of Appeals for the Fourth Circuit unanimously affirmed, thoroughly discussing Consolidation Coal's contention that the claim was untimely. Pet. App. 11a-19a. The Court recognized that since pneumoconiosis is recognized as a "latent and progressive disease", 20 C.F.R. § 718.201(c), the Act provides that a miner may file a subsequent claim after his first claim is denied, if the miner can demonstrate a "material change in circumstances." 20 C.F.R. § 725.309(d). The Court noted that it had extensively considered the appropriate standard for evaluating a miner's subsequent claim after a prior denial of benefits in its *en banc* decision in Lisa Lee Mines v. Director, OWCP, 86 F.3d 1358 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997). Since Lisa Lee Mines is grounded on the principle that a prior

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[1] One Board member dissented on another issue. *See* Pet. App. 55a.

denial of black lung benefits must be accepted as both final and correct, it necessarily follows that a medical determination of total disability due to pneumoconiosis made prior to such denial of benefits was a misdiagnosis:

> For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's pneumoconiosis as of January 11, 1996 necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim, we must necessarily conclude that the (mis) diagnosis had no effect on the statute of limitations for his second claim. Consolidation Coal Co. v. Williams, supra, 453 F.3d at 616. Pet. App. 14a.

Consolidation Coal's petition for rehearing and rehearing *en banc* was denied with no judge voting for rehearing. Pet. App. 1a-2a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT AMONG THE CIRCUITS AND NO CONFLICT WITHIN THE FOURTH CIRCUIT.

A. There Is No Split Among the Circuits.

Consolidation Coal alleges a split within the circuits, claiming that the Sixth Circuit's decision in Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602 (6th Cir. 2001), is contrary to the decision below. Pet. at 6. As we now explain, the statement in Kirk on which petitioner relies was

dicta and has since been repudiated by the Sixth Circuit itself in a decision that recognized the statement as dicta.

In Kirk, the Sixth Circuit said that the black lung statute of limitations expires for all time three years after the first medical determination of total disability due to pneumoconiosis, unless the miner returns to work. 264 F.3d at 608. However, this statement was dicta. The issue decided in Kirk was whether the employer had established, pursuant to 20 C.F.R. § 725.308(c), that statements by doctors more than three years prior to 1992, when the miner filed his fourth black lung application, constituted "medical determination[s]" under 30 U.S.C. § 932(f) and 30 C.F.R. § 308(a). Kirk held that these statements did not constitute "medical determination[s] of total disability due to pneumoconiosis," even though the miner had filed previous claims and, thus, the court found the miner's 1992 application to be timely. The court then went on to note that Tennessee Consolidated Coal "complains that our acceptance of Kirk's claim as timely implies it will never know when its liability for a particular miner will cease, defeating the purpose of a statute of repose." 264 F.3d at 608. This statement was classic dicta, however, as it did not apply to Mr. Kirk's claim which, as noted above, the court found timely.

That Kirk's statement was dicta without binding effect in the Sixth Circuit wholly undermines petitioner's claim of a circuit split. But the claim of a circuit split is even weaker than that. Petitioner has neglected to advise this Court that, after Kirk, the Sixth Circuit issued an unpublished decision in which it decided the statute of limitations issue just as the Fourth Circuit has and for the same reasons. In Peabody Coal Co. v. Director, OWCP (Dukes), 48 Fed. Appx. 140 (6th Cir. 2002), Mr. Dukes filed an application for black lung benefits in 1988, after being advised by doctors that he suffered from

pneumoconiosis. The claim was denied by the Department of Labor, and Mr. Dukes took no further action. He filed a second claim in 1995, which was approved. Peabody Coal Company appealed, claiming that Kirk barred the claim.

The Sixth Circuit rejected the company's contention, holding that when the Department of Labor denies a claim after a medical determination of pneumoconiosis, the medical determination is by definition erroneous, and thus constitutes a misdiagnosis with no effect on the statute of limitations:

> That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes. If he later contracted the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, the statute of repose does not commence until a *proper* medical determination.

48 Fed. Appx. at 146 (emphasis in original).

In reaching this conclusion, the Sixth Circuit considered the statutory language, the Tenth Circuit's decision in Wyoming Fuel Co. v. Director, OWCP, 90 F.3d 1502, 1507 (10th Cir. 1996), the judicial recognition that pneumoconiosis is a progressive disease, and the inherent unfairness of holding a miner responsible for a physician's misdiagnosis of the disease. Id., at 145-146. The Sixth Circuit also considered the contrary language in Kirk. The Court specifically found this language was dicta: "Today, we have carefully considered this issue and hold otherwise." Id. at 147.

The Fourth Circuit understood all of this. It noted that the language in Kirk was dicta that was "disavowed" by the Sixth Circuit itself. Pet. App. 15a n 2; Williams, 453 F.3d at 616 n.2. The Fourth Circuit also recognized that its holding was in agreement with the Tenth Circuit's decision in Wyoming Fuel Co., supra. Hence, there is no conflict among the circuits. The Fourth, Sixth and Tenth Circuits all agree that a (mis)diagnosis of total disability due to pneumoconiosis is nullified for statute of limitations purposes when the Department of Labor subsequently denies the miner's black lung claim.

B. There Is No Conflict Within the Fourth Circuit.

Consolidation Coal also alleges that the Fourth Circuit's decision below is "irreconcilable" with its decision in Island Creek Coal Co. v. Henline, 456 F.3d 421 (4th Cir. 2006). *See* Pet. at 7, 10. The fundamental answer to the company's claim is that an intra-circuit split – assuming that the intra-circuit split is genuine – is not a basis for review by this Court, *see* S. Ct. Rule 10, but rather a reason for the court of appeals to grant en banc review.

In any event, no genuine intra-circuit split exists here, as the Fourth Circuit's unanimous denial of en banc review here strongly suggests. In Henline, the Court rejected an interpretation of 30 U.S.C.§ 932(f) and 30 C.F.R. § 308(a) by the Benefits Review Board that a medical determination of total disability due to pneumoconiosis must be in writing. Agreeing with the Department of Labor's Office of Workers' Compensation Programs, the court held that the Board's requirement of a written notice before the statute of limitations can be triggered was inconsistent with the statute, which does not require that the notice be in writing.

The Fourth Circuit's decision in Henline does not conflict with the decision below. In Henline, the Benefits Review Board had added an element that was nowhere present in the statute. In contrast, the panel decision here represents an interpretation that is consistent with the text of 30 U.S.C. § 932(f) as well as the overall structure and purpose of the black lung compensation program. In both cases, the Court agreed with the Director's reasonable interpretation of the statute.[2]

II. THE DECISION BELOW CORRECTLY INTERPRETS THE STATUTE.

Petitioner argues that the decision below "rewrites the statute," which is "plain and unambiguous." Pet. at 8-10, 14-15. Section 422(f) of the Act, 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits . . . shall be filed within three years after whichever of the following occurs later – (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." The regulation that implements this provision, 20 C.F.R.§ 725.308(a), provides that

> [a] claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of

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[2] We note that Judge Gregory both wrote the decision in Williams and joined in the panel decision in Henline.

> 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

Consolidation Coal argues that the plain meaning of the statute is that once a miner has received a medical determination of total disability due to pneumoconiosis, any and all claims must be filed within three years of that medical determination. For at least three separate reasons, petitioner is wrong.

First, the Fourth Circuit's interpretation of the statute makes sense. As courts have recognized for decades, pneumoconiosis is a latent and progressive disease. *See, e.g.*, Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 138 (1987); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 7-8 (1976). Six years ago, the Department of Labor amended the regulatory definition of pneumoconiosis so as to provide that "[f]or purposes of this definition, pneumoconiosis is recognized as a latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c). When criticized by the coal mining industry for proposing this amendment to the regulatory definition of pneumoconiosis, the Department of Labor, in the preamble to the final regulation, published a list of dozens of cases from all circuits, which recognize that pneumoconiosis is a progressive disease. *See* 65 Fed. Reg. 79920, 79971-72 (December 20, 2000).

Since pneumoconiosis is latent and progressive, it may not be diagnosable, or it may not reach the stage of creating disability, until long after the miner has ceased his coal mine employment. During this period of time, the miner may file a premature black long claim, and he may receive an inaccurate medical diagnosis of total disability due to pneumoconiosis. Because of the latent and progressive nature

of the disease, the Department of Labor promulgated 20 C.F.R. § 725.309 to permit the filing of a subsequent claim for benefits after a previous claim is denied.

The panel below reviewed the Fourth Circuit's *en banc* decision in Lisa Lee Mines v. Director, OWCP, supra, in which the Court interpreted 20 C.F.R. § 725.309(d). In Lisa Lee Mines, the Court reasoned that once a black lung decision has become final, it must be presumed to be correct. As stated by the Court,

> The 1986 denial is final, and for present purposes we must assume that it was correct . . . .
>
> If the 1986 denial is "final" in a legal sense, we must accept the correctness of its legal conclusion – Rutter was not eligible for benefits at that time – and that determination is as off-limits to criticism by the respondent as by the claimant. Only by repudiating the 1986 judgment and its necessary factual underpinning can no change in Rutter's condition be found. We believe that such repudiation is improper.
>
> Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical – perhaps the only practical – way to discern a concrete form in the mists of the past . . . The final decision of the ALJ (or the BRB or claims examiner) on the spot is the best evidence of the truth at that time.

Lisa Lee Mines, 86 F.3d at 1361; *See* Williams, 453 F.3d at 615; Pet. App. 13a. The panel then reasoned that the principles of finality contained in Lisa Lee Mines apply in the context of a medical opinion that triggers the statute of limitations:

> For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's pneumoconiosis as of January 11, 1996 necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we must treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim, we must similarly conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim.

Id., 453 at 616. Pet. App. at 14a.

This interpretation of 20 C.F.R. § 725.308 was strongly advocated by the Director in litigation before the Fourth, Sixth and Tenth Circuits. Indeed, when the Department of Labor was promulgating revisions to the regulation on duplicate claims, 20 C.F.R. § 725.309, in the preamble it relied heavily on the Fourth Circuit's decision in Lisa Lee Mines. *See* 65 Fed. Reg. at 79968. Deference should be accorded to the Department of Labor's consistent and reasonable interpretation of the statute. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991); Mullins Coal Co. v. Director, OWCP, 484 U.S. at 159; Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Second, Consolidation Coal has itself re-written the statute. As applied to filing a claim after a medical determination, the black lung statute of limitations provides that "[a]ny claim for benefits . . . shall be filed within three years after . . . . a medical determination of total disability due to pneumoconiosis". 30 U.S.C. § 932(f). Read literally, the plain meaning of this statute is that "any claim" may be filed within three years from "a" medical determination of

total disability due to pneumoconiosis. Thus, each separate medical determination of total disability due to pneumoconiosis that a miner receives would trigger its own three-year limitations period for filing a new claim. The result of this literal interpretation of the statute's words would be quite broad, because it would allow a miner to restart the limitations period simply by obtaining a new medical determination of total disability due to pneumoconiosis. However, this is the "plain meaning" of the statute.

The Sixth Circuit was correct in stating in Peabody Coal Company that "[t]he term 'medical determination' is not defined in the statute." 48 Fed. Appx. at 145. Thus, the term "medical determination" must be interpreted. The interpretation propounded by the Fourth, Sixth and Tenth Circuits, and by the Director, is reasonable, taking into consideration both the latent and progressive nature of pneumoconiosis and concern for the fact that a premature misdiagnosis of pneumoconiosis could permanently doom a miner's worthy claim for black lung benefits. The interpretation advocated by the petitioner, on the other hand, is not actually the plain meaning of the statute, is unsupported by any authority, and would serve to unnecessarily deny meritorious black lung claims.

Third, petitioner's argument is logically incoherent in stressing that Mr. Williams did not submit the report of Dr. Lebovitz to the Department of Labor while his first claim was pending. Pet. at 8 n. 3, 13. Indeed, Consolidation Coal moralistically suggests that this fact is a reason why Mr. Williams' second black lung claim was filed untimely:

> The panel's decision excuses Mr. Williams' purposeful choice to withhold Dr. Lebovitz's report and impose no consequences on him for withholding

> that information despite his being informed he was totally disabled as a result of pneumoconiosis by a physician. Pet. at 13.

However, under the petitioner's interpretation of the statute, it would not matter at all whether Mr. Williams ever submitted the report of Dr. Lebovitz to the Department of Labor. Petitioner asserts that once Mr. Williams received Dr. Lebovitz's opinion, he had three years from that date within which to file his claim. It does not matter whether the opinion of Dr. Lebovitz was a misdiagnosis or whether the opinion was based on any documentation or reasoning.[3] Nor should it matter under the petitioner's interpretation of the statute what Mr. Williams did with Dr. Lebovitz's opinion. The only reason for Consolidation Coal to stress the fact that Mr. Williams did not submit Dr. Lebovitz's opinion to the Department of Labor is to attempt to place Mr. Williams in a bad light. Petitioner's reliance on this fact shows the weakness of its argument.

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[3] The administrative law judge found that Dr. Lebovitz's opinion was unreasoned and undocumented, and would almost certainly not have changed the Department of Labor's disposition of the claim.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 06-806

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY, PETITIONER

v.

BILLY D. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Black Lung Benefits Act provides that "[a]ny claim for benefits by a miner * * * shall be filed within three years after * * * a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1). The question presented is whether, in a subsequent claim for benefits under the Act, the statute of limitations is triggered by a medical diagnosis that pre-dates a prior denial of such benefits.

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In the Supreme Court of the United States

No. 06-806

CONSOLIDATION COAL COMPANY, PETITIONER

v.

BILLY D. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-29a) is reported at 453 F.3d 609. The decisions and orders of the Benefits Review Board (Pet. App. 30a-56a) and administrative law judge (Pet. App. 57a-80a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. A petition for rehearing was denied on September 8, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (the Act) provides compensation "to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). A miner seeking disability benefits must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that pneumoconiosis contributes to the total disability. 20 C.F.R. 725.202(d). Pneumoconiosis is a latent and progressive disease; its symptoms may appear and worsen gradually. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 139, 151 (1987); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7-8 (1976); 20 C.F.R. 718.201(c). The Secretary of Labor, who is responsible for administering the Act, 30 U.S.C. 936(a), therefore has promulgated rules allowing miners to make a subsequent claim at least one year after the denial of a prior claim for black lung benefits. 20 C.F.R. 725.309(d). To preserve the finality of the prior determination, a subsequent claim will be denied unless "the claimant demonstrates that one of the applicable conditions of entitlement," upon which the prior denial was based, "has changed since * * * the order denying the prior claim became final." *Ibid.* At issue in this case is the application of the Act's statute of limitations to subsequent claims. The Act provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after * * * a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1); see 20 C.F.R. 725.308 (adding requirement that medical determination be "communicated to the miner").

2. Respondent Billy D. Williams worked as a coal miner for at least 30 years, and worked for petitioner

Consolidation Coal Co. from 1957 until he retired in 1987. Pet. App. 4a, 59a. In July 1995, Williams filed a claim for black lung benefits with the Department of Labor's Office of Workers' Compensation Programs (OWCP), which makes initial determinations on such claims. *Id.* at 4a; see 20 C.F.R. 725.351, 725.401-725.420. In November 1995, Williams received a letter from Dr. Jerome J. Lebovitz, which stated that Williams "was permanently and totally disabled secondary to the entity of Coal Worker's Pneumoconiosis." Pet. App. 4a (internal quotation marks omitted); see *id.* at 32a n.1; App., *infra*, 2a. OWCP denied Williams's claim in January 1996 on the ground that Williams failed to establish that he had pneumoconiosis and that he was totally disabled as a result of pneumoconiosis. Pet. App. 4a, 32a n.1, 71a.[1]

In June 2001, Williams filed a second claim for benefits. Pet. App. 4a, 31a-32a, 61a. In 2002, OWCP found Williams entitled to benefits, and petitioner requested a hearing before an administrative law judge (ALJ). *Id.* at 32a; see 20 C.F.R. 725.421(a) (providing for ALJ adjudication of contested cases). Petitioner filed a motion to dismiss the second claim on the ground that it was barred by the Act's three-year statute of limitations, which commences upon "a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1). Petitioner contended that the limitations period began with the November 1995 letter from Dr. Lebovitz, and

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[1] The 1996 denial was based largely on the results of an OWCP-ordered physical examination of Williams, which was carried out by Dr. Andrzej J. Jaworski. Pet. App. 4a, 32a n.1. The Benefits Review Board in this case concluded that the Lebovitz letter referred to above was not in the record before OWCP. *Ibid.*

that Williams could not bring his claim almost six years later. Pet. App. 4a; see *id.* at 32a n.1, 65a.

3. a. The ALJ denied petitioner's motion to dismiss. App., *infra*, 1a-4a. In accordance with *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the ALJ found that the 1996 denial of Williams's claim repudiated Dr. Lebovitz's November 1995 diagnosis of totally disabling pneumoconiosis and "nullified" that determination's "ability to trigger the statute of limitations." App., *infra*, 2a. The ALJ also took "official notice" of the fact that the 1995 medical determination was "unreasoned and undocumented and would almost certainly not have changed the Department of Labor's disposition of the [1995] claim." *Id.* at 3a.

In a later decision on the merits, the ALJ denied petitioner's renewed motion to dismiss for the same reasons. Pet. App. 69a-70a. Based on a review of all the medical evidence submitted after Williams filed his second claim, the ALJ concluded that Williams had established a change in his medical condition and was now totally disabled by pneumoconiosis. *Id.* at 70a-80a.[2]

b. The Benefits Review Board affirmed the ALJ's decision. Pet. App. 30a-56a; see 30 U.S.C. 921(b) (Board reviews ALJ decisions); 20 C.F.R. 725.481, 801.102(a)(6) (same). The Board agreed with the ALJ that Dr. Lebovitz's November 1995 report did not trigger the three-year statute of limitations. Pet. App. 40a. The Board also upheld the ALJ's award of benefits on the merits. *Id.* at 51a-54a.

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[2] The ALJ also ruled against petitioner on a number of evidentiary issues and refused to disqualify himself for alleged bias. Pet. App. 66a-70a. The Benefits Review Board affirmed the ALJ's rulings on those issues, *id.* at 41a-51a, and the court of appeals affirmed, *id.* at 19a-26a. Petitioner does not seek review of those rulings.

4. The court of appeals denied the petition for review of the Board's decision. Pet. App. 3a-29a. On the statute of limitations issue, the court held that Dr. Lebovitz's November 1995 report did not trigger the three-year statute of limitations on Williams's June 2001 subsequent claim. *Id.* at 11a-19a. Citing its holding in *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1090 (1997), the court of appeals held that the prior denial of Williams's claim for black lung benefits had to be accepted as a final and correct determination that Williams was not totally disabled by pneumoconiosis on the date of the denial. Pet. App. 13a-14a. The court therefore treated the 1995 physician's report, "for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim." *Id.* at 14a. Because the report "related solely to Williams's condition in *1995*, [it] could not have sustained a subsequent claim that his condition had materially worsened since the initial denial of benefits in *1996*." *Id.* at 17a-18a (emphasis in original). The court therefore concluded that the 1995 report was legally irrelevant to Williams's subsequent claim, and could not trigger the statute of limitations for that claim. *Id.* at 14a, 18a.

The court further explained that its decision was consistent with the Black Lung Benefits Act in three respects. First, the court reasoned that the latent and progressive nature of pneumoconiosis required that a claimant should be free to reapply for benefits if his first filing was premature. Pet. App. 15a-16a. Second, the requirement that a miner prove a material change in conditions on a subsequent claim showed, in the court's view, that "[i]t would be illogical and inequitable to hold that a diagnosis that could not sustain a subsequent

claim could nevertheless trigger the statute of limitations for such a claim." *Id.* at 18a. Finally, the court concluded that allowing a misdiagnosis to bar a future claim could defeat the statute's purpose by making miners reluctant to seek medical advice in the early stages of pneumoconiosis. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

Petitioner argues (Pet. 7-13) that the statute of limitations in the Black Lung Benefits Act begins running for *all* claims upon communication to the miner of the *first* medical diagnosis of totally disabling pneumoconiosis. But the statute provides that "*[a]ny* claim for benefits by a miner under this section shall be filed within three years after * * * *a* medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1) (emphasis added). Petitioner's interpretation requires the addition of limiting language to the plain terms of the statute.

The statute of limitations nevertheless may be ambiguous as applied to the particular facts of this case because it does not specify *which* medical determination triggers the limitations period when, as here, there has been an intervening denial of benefits. Petitioner's proposed application of the statute of limitations in those circumstances, however, conflicts with the "special preclusion rules that apply in this area." *Midland Coal Co.* v. *Director, OWCP*, 358 F.3d 486, 489 (7th Cir. 2004). Because pneumoconiosis is a latent and progressive disease, the Director's regulations—which petitioner does

not challenge—allow a miner to file a subsequent claim if his first claim was premature. 20 C.F.R. 725.309(d). As the Fourth Circuit has noted, "[a] new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same. * * * [R]es judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times." *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358, 1362 (1996) (en banc), cert. denied, 519 U.S. 1090 (1997). That is so because "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication." *Ibid.*

To conform serial black lung claims to traditional principles of issue and claim preclusion, however, those courts of appeals which have considered the problem have unanimously held that a prior denial of benefits must be "presumed to have been correct when made and to continue to be correct through time." *Lisa Lee Mines*, 86 F.3d at 1363. See *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1008-1009 (7th Cir. 1997) (en banc); *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445, 453-454 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998); *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1508-1509 (10th Cir. 1996); *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 313-314 (3d Cir. 1995); *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998-999 (6th Cir. 1994). A subsequent claimant therefore is "precluded from collaterally attacking the prior denial of benefits," but he "may file a new claim, asserting that he is *now* eligible for benefits because he has become totally disabled due to coal miner's pneumoconiosis and that his disability occurred subsequent to the prior adjudication." *Labelle Processing*, 72 F.3d at 314. The Director's regulations codify that understanding. See 20 C.F.R. 725.309(d) ("A subse-

quent claim * * * shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement * * * has changed since the date upon which the order denying the prior claim became final.").

These principles govern the timeliness of subsequent black lung benefit claims no less than the merits of such claims. The rejection of a prior claim on the ground that the claimant was not totally disabled by pneumoconiosis must be treated as correct and final with respect to that issue at that time. The court of appeals correctly noted in this case that the denial of Williams's 1996 claim rendered his 1995 diagnosis a legal nullity—a "misdiagnosis" that had "no effect on the statute of limitations for [Williams's] second claim." Pet. App. 14a.[3] The Tenth Circuit reached a similar result in *Wyoming Fuel*, *supra*. In that case, the court held that "a final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." 90 F.3d at 1507.

Petitioner argues (Pet. 6) that the law of the Sixth Circuit is in conflict with that of the Fourth and Tenth Circuits.[4] Petitioner is mistaken. In *Tennessee Consoli-*

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[3] As the court of appeals pointed out, the determination that Williams did not have totally disabling pneumoconiosis in 1996 is "final and correct[] regardless of whether the DOL reviewed Dr. Lebovitz's diagnosis in adjudicating the claim." Pet. App. 14a.

[4] Petitioner also argues (Pet. 7, 10-11) that the decision in this case is in conflict with the Fourth Circuit's decision in *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (2006). Conflicts within a circuit's law are not for this Court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Even so, there is no conflict. *Henline* addressed the

dated Coal Co. v. *Kirk*, 264 F.3d 602 (2001), the Sixth Circuit held that several prior reports relied upon by an employer seeking to foreclose a subsequent claim "failed to demonstrate that a diagnosis of total disability due to pneumoconiosis was made." *Id.* at 607. The statement petitioner cites—that "[m]edically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period," *id.* at 608—is dicta. The claim at issue in *Kirk* was not "[m]edically supported." *Id.* at 607. The Sixth Circuit has recognized as such in a subsequent unpublished decision. *Peabody Coal Co.* v. *Director, OWCP*, 48 Fed. Appx. 140, 147 (2002). In that case, the court reached the same result as the Fourth and Tenth Circuits: "[I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes." *Id.* at 146.

Finally, petitioner's interpretation of the statute of limitations would frustrate the Director's regulatory framework for considering subsequent claims and the purposes of the Black Lung Benefits Act. Petitioner rightly does not contend that the statute of limitations precludes subsequent claims. Cf. *Lisa Lee Mines*, 86 F.3d at 1363 n.9. But requiring miners to bring all claims within three years after their *first* diagnosis would bar most subsequent claims. The court of appeals' decision also is more consistent with the latent and progressive nature of pneumoconiosis because it

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question whether a "medical determination" had to be in writing in order to trigger the statute of limitations, a question not presented in this case. 456 F.3d at 425.

prevents a misdiagnosis from foreclosing relief when a miner's symptoms develop at a later time. Contrary to petitioner's assertion (Pet. 14), the decision below does not render the statute of limitations "meaningless." A miner who receives a diagnosis of totally disabling pneumoconiosis and does nothing for more than three years will not be eligible for benefits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007

APPENDIX

[Seal Omitted]

UNITED STATES DEPARTMENT OF LABOR
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Case No.: 2002-BLA-05329

IN THE MATTER OF: BILLY D. WILLIAMS, CLAIMANT

v.

CONSOLIDATION COAL COMPANY, EMPLOYER,

AND

DIRECTOR, OFFICE WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

Issue Date: 16 Apr. 2004

ORDER DENYING RENEWED MOTION FOR SUMMARY JUDGMENT AND SETTING A BRIEFING SCHEDULE

Employer, Consolidation Coal Company, renews its motion for summary judgment first made at the hearing in the captioned case (Tr. 55-6). Employer bases its motion on the statute of limitations in 30 U.S.C. 932(f) and 20 C.F.R. 725.308, which require a miner to file a claim within three years following a medical determination of

his total disability due to pneumoconiosis. Exceptions can be made for good cause. *Id.*

The facts are not in dispute. Mr. Williams has twice filed Black Lung claims-on July 31, 1995 and June 11, 2001 (DE 1, 3). Claimant wrote to Claims Examiner Juliette DeMoss in December 2001 forwarding to her a November 9, 1995 medical report of Dr. Jerome J. Lebowitz, which report Claimant's attorney, Anthony Kovach, had forwarded to Claimant. Attorney Kovach had explained to Mr. Williams in 1995 that Dr. Lebowitz's report (DE1) definitely stated that Claimant had black lung disease and was totally disabled therefrom (Tr. 46-7). Employer contends that Claimant's learning about this letter (sometime in 1995) triggered the running of the statute of limitations both for Claimant's initial claim and his current or "duplicate" claim.

For the following reasons, I am denying Employer's motion:

1. The Department of Labor denied Mr. Williams' first claim after the issuance of Dr. Lebowitz' letter and after its contents were made known to Claimant. The court in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996) held that a final order by an Office of Workers' Compensation Program adjudicator that a claimant is not totally disabled due to pneumoconiosis "repudiates any earlier medical determination to the contrary and renders prior medical advice ineffective to trigger the running of the statute of limitations." Thus, under *Wyoming Fuel Co,* the Department of Labor's denial of Mr. Williams' first claim on January 11, 1996, nullified the communication by Dr. Lebowitz insofar as its ability to trigger the running of the statute of limitations is concerned.

2. I understand that there is contrary precedent in the Sixth Circuit. *See Kirk v. Consolidated Coal Co.*, 264 F.3d 602 (6th Cir. 2001). However, the persuasiveness of this precedent is lessened considerably by a subsequent unpublished decision to the contrary in the same circuit. *Peabody Coal Co. v. Director, OWCP (Dukes)*, No. 01-3043 (6th Cir. Oct. 2, 2002) (unpub.).

3. Employer seeks to distinguish *Wyoming Fuel Co.* from the present case in that, unlike in *Wyoming Fuel Co.*, the Department of Labor claims examiner here did not have the doctor's letter before it when it denied the claim. I regard this as a distinction without a significant difference because there is no showing that the Department of Labor would have reached a different result in the present case had it been informed of Dr. Lebowitz's opinion. Indeed, I take official notice of the fact that Dr. Lebowitz's opinion is unreasoned and undocumented and would almost certainly not have changed the Department of Labor's disposition of the claim.

4. At the time of Mr. Williams' filing his second claim, the law in effect as enunciated by the Benefits Review Board in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) was to the effect that the statute of limitations in 20 C.F.R. 725.308 did not apply to duplicate claims. Therefore, to rule in Employer's favor on this motion would be to retroactively apply present law concerning the effect of that regulation on duplicate claims. I decline to do so and find that justice does not require me to.

For the reasons stated above, Employer's renewed motion for summary judgment is DENIED. Because Employer has stated that it will not comply with my discovery order, there is no point in further delaying the

setting of a briefing schedule. Therefore, it is hereby ORDERED that briefs in the captioned case are due May 3, 2004.

/s/ FLETCHER E. CAMPBELL, JR.
FLETCHER E. CAMPBELL, JR.
Administrative Judge

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Newport News, Virginia